United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4044,45

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOC INTERNATIONAL LIMITED, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

AIRCO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petitions for review of an Order
of the Federal Trade Commission

BRIEF FOR RESPONDENT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-4044, 76-4045

BOC INTERNATIONAL LIMITED, et al., Petitioners,

v.

FEDERAL TRADE COMMISSION, Respondent.

AIRCO, INC., Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent.

On Petitions for review of an Order
of the Federal Trade Commission

BRIEF FOR FEDERAL TRADE COMMISSION

STATEMENT OF THE ISSUES

1. Whether substantial evidence and the law supports the Commission's finding that the acquisition by British Oxygen Company of 35 percent of Airco, Inc. stock may substantially lessen competition in the U.S. industrial gases industry within the meaning of

Section 7 of the Clayton Act, as amended.

2. Whether substantial evidence and the law supports the Commission's finding that the acquisition also violated Section 7 in the manufacture and sale of inhalation anesthesia machines, inhalation anesthesia vaporizers, and inhalation anesthesia face masks.

3. Whether substantial evidence and the law supports the Commission's finding that Airco, in facilitating the acquisition, violated Section 5 of the Federal Trade Commission Act.

STATEMENT OF THE CASE

This is before the Court on petitions for review of an order of the Federal Trade Commission issued December 8, 1975, which would require BOC[1/] to divest itself of its stock interest in Airco, Inc. As more fully described below, the Commission's proceedings culminated in a finding by the Commission that BOC's 1973 acquisition of 35 percent of the common stock of Airco violated Section 7 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.[2/] The Commission also found that Airco, through certain actions and agreements of its board of directors, facilitated BOC's acquisition of its stock, and in doing so Airco violated Section 5(a)(1) of the FTC Act.

1/ All four petitioners in No. 76-4044 will collectively be referred to as "BOC" in this brief.

2/ Section 7 (15 U.S.C. § 18) provides in pertinent part that

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

At the time the complaint issued, § 5(a)(1) of the FTC Act stated that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." This was amended in 1975 to substitute "in or affecting commerce" for the phrase "in commerce." See 15 U.S.C. (Supp. V) § 45(a)(1).

The Proceeding Below

On February 26, 1974, approximately two months after the acquisition, the Commission issued its complaint (A17-24) 3/ charging that the effect of the acquisition may be substantially to lessen competition in the manufacture, distribution or sale of, *inter alia*, industrial gases, inhalation anesthetic equipment, inhalation therapy equipment, or any submarkets thereof, and that agreements between Airco and BOC may unreasonably restrain trade and hinder competition. 4/

A. The Initial Decision

After expedited hearings, 5/ the Administrative Law Judge issued a 122-page initial decision (A730-851, A5330-36) in which he made detailed findings and concluded that the charges of violation of Section 7 of the Clayton Act and Section 5 of the FTC Act had been sustained. His major findings were that as a result of the acquisition

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3/ Unless otherwise indicated, parenthetical references are to the Joint Appendix.

4/ On the day the administrative complaint was issued, the Commission applied to the United States District Court of the District of Delaware for preliminary injunctive relief. On March 8, 1974, the court issued a preliminary injunction requiring BOC to maintain Airco as a separate company and restraining it from, among other things, exchanging trade secrets with Airco. *FTC* v. *British Oxygen Co.*, 1974-1 Trade Cases ¶75,003 (D.Del. 1974). On appeal of Airco, the Third Circuit vacated a portion of the injunction which barred Airco from disposing of or encumbering assets unrelated to the lines of commerce involved in the Commission's complaint. *FTC* v. *British Oxygen Co.*, 529 F.2d 196 (3d Cir. 1976)(*en banc*). The injunction, as modified, remains in effect.

5/ Twenty-eight witnesses testified and several thousand pages of documentary evidence were received at the hearings which commenced on May 6, and concluded June 27, 1974.

BOC has been eliminated as a significant potential entrant into the U.S. industrial gases market and that actual competition between BOC and Airco in the manufacture of inhalation anesthetic equipment, and both actual and potential competition between BOC and Airco in inhalation therapy equipment, had been eliminated. He also found that, as a perceived potential entrant, BOC exerted a beneficial influence on competitive conditions in the U.S. industrial gases market and that the acquisition increased entry barriers in that market.

B. The Commission's Decision

On appeal, the Commission issued an opinion (A865-911) concluding that at the time of the acquisition there was a reasonable probability that BOC would have eventually entered the U.S. industrial gases market by internal expansion or by a toe-hold acquisition if it had been barred from acquiring Airco. It disagreed, however, with the ALJ's finding that BOC's position on the fringe of the market had exerted any limiting effect on prices. *Cf.* *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973). The Commission also vacated the ALJ's finding that the acquisition increased entry barriers in the industrial gases market, finding insufficient support in the record (*id*).

Thus, the Commission was faced with the question which the Court in _United States_ v. _Marine Bancorporation_, 418 U.S. 602, 625 (1974) considered at length but did not have to resolve,[6/] _i.e._,

> whether the potential-competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a _de novo_ undertaking or through the acquisition of a small existing entrant (a so-called foothold or toehold acquisition).

Although the Court found it unnecessary to resolve that issue in _Marine Bancorporation_, it did set forth the following criteria for application of such an "actual potential entrant" rationale: (1) an oligopolistic market, (2) a showing that the acquiring firm has available feasible means for entering the market other than by the acquisition in question, and (3) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects. _Id._ at 630-31, 633.[7/]

6/ The question was also raised but not resolved in _United States_ v. _Falstaff Brewing Corp._, _supra_, 410 U.S. at 537.

7/ Because of the legal barriers to entry in banking in the state of Washington, notably state law prohibitions against _de novo_ branching from a branch office, and multibank holding companies, the Court in _Marine Bancorporation_ held that the Government had failed to show that feasible alternative methods of entry existed for the acquiring bank or that any alternative means of entry offered a "reasonable prospect of long-term structural improvement or other benefits in the target market." _Id._ at 638-39. No such regulatory restraints on entry exist with respect to industrial gases.

Finding those criteria to be satisfied in this case, the Commission determined that a violation of Section 7 had been demonstrated in the industrial gases market. Thus, the Commission found that market to be highly concentrated and in need of new competition (A873-77, A897-98), that de novo and toehold entry were, and are, feasible alternative means of entry open to BOC (A887-88), and that those means offer a substantial likelihood of producing deconcentration and other procompetitive effects (A880, A901).

The Commission found that there is only a small handful of possible significant entrants into the U.S. market, that BOC is the most likely to effectuate entry, and that "[b]y stepping into Airco's shoes, BOC virtually removed any prospect that any major future procompetitive entry would ever occur in this industry" (A880).

The Commission further observed that, although there was no evidence of a previous disciplining effect on U.S. prices by the presence of BOC as a perceived potential entrant, the possibility of entry by BOC may become a factor "to be reckoned with" by U.S. industrial gases firms, and that the acquisition removed BOC's presence on the fringe of the market, "which might in the future have had some disciplining effect on U.S. market prices" (A880, emphasis in original).

As to the medical equipment manufacturing lines of commerce, the Commission agreed with BOC's argument that "inhalation anesthetic equipment" and "inhalation therapy equipment" market definitions were too broad as they each encompassed a vast number

of non-interchangeable items that were sold separately and not necessarily as a full line by a majority of firms producing them. However, since the sales data of manufacturers of all the individual items encompassed within those market definitions were in the record and listed in the initial decision (A5333-34), the Commission calculated the market shares of BOC and Airco and concluded that substantial horizontal competition was eliminated in violation of Section 7 in the manufacture and sale of anesthesia machines, anesthesia vaporizers, and anesthesia face masks (A905-07).

Finally, the Commission held that Airco, by consenting to BOC's tender offer and facilitating the acquisition, violated Section 5 of the FTC Act.

The Commission, in its "Findings as to the Facts, Conclusions and Order," modified a number of findings contained in the initial decision (A853-60).

C. The Commission's Order

The ALJ's order required BOC to divest its stock interest in Airco within one year. In addition it prohibited BOC from acquiring, during the next 10 years, any interest in a firm engaged in the lines of commerce in which violations were found unless Commission approval is first secured.

The Commission adopted the ALJ's order but, insofar as it barred acquisition of industrial gases firms, modified it to allow BOC to acquire a firm doing less than $25 million a year business in industrial gases (A910).

The ALJ's order, which required BOC and Airco to cease any representation on each other's respective board of directors and to cease taking any steps to implement certain agreements entered into before the acquisition, was also modified by the Commission to permit Airco to exercise a "right of first refusal" upon sale by BOC of its Airco stock holdings (A910-11).

Summary of the Facts

I. Introduction

The Administrative Law Judge's initial decision (A730-851, A5330-36), which was adopted for the most part by the Commission (A853-60), and the Commission's Opinion (A865-911) contain detailed statements of the findings, including citations to the evidence upon which they are based. The facts as to the parties and the acquisition may be summarized as follows:

A. BOC. The British Oxygen Company Limited, now known as BOC International Limited, is a publicly-held United Kingdom company with its principal office in London, England. In 1972 and 1973, BOC was a leading manufacturer of industrial gases in 17 other countries, including Australia, Canada, Italy, and Brazil. (A736-37, A854, A867.)

At the time of the acquisition, BOC was the second largest industrial gases firm in the world (A5347). In addition to industrial gases, BOC also produces and sells medical gases, equipment for the manufacture and storage of certain gases at extremely low temperatures (cryogenic equipment), welding and cutting equipment, various medical equipment, chemicals, metals, vaccuum engineering, and some consumer products. In its fiscal

year ending September 30, 1973, BOC had total sales of about $766 million. (A737, A854, A867).

BOC, through its own Advanced Engineering Division and two U.S. subsidiaries, Fraser Sweatman, Inc. and Harris-Lake, Inc., also marketed certain types of inhalation anesthetic equipment in the United States at the time of the acquisition (A3210, A789-90, A5333-34).[8/]

B. Airco. Petitioner Airco, Inc. is a New York corporation with its principal office in Montvale, New Jersey. At the time of the acquisition it was the nation's third largest producer of industrial gases, with gases plants in 22 locations scattered throughout the United States and producing acetylene, argon, nitrogen, oxygen, nitrous oxide, medical gases, rare gases, carbon dioxide, hydrogen, and mixtures of gases (A739-40). Airco has been ranked as the fifth largest gases firm in the world (A5347). Airco also manufactures other industrial products and in 1973 had total sales of $583,811,000 and net income of $19 million (A739-40).

At the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco was the leading manufacturer of various inhalation anesthetic equipment in the United States (A740, A5333-34).

C. BOC's acquisition of controlling interest in Airco. BOC acquired its interest in Airco in late December 1973 (A744). For

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8/ Fraser Sweatman was the U.S. subsidiary of Cyprane, Ltd. a United Kingdom Company which was acquired by BOC in 1972. Harris-Lake, Inc. was the subsidiary of Harris Calorific Company, a United States company, full control of which was acquired by BOC in November 1973. (A738.)

a number of years BOC had expressed interest in entering the United States industrial gases market and had examined a number of domestic gases companies as possible acquisition candidates (A884-86). In June 1973, it learned of rumors of an impending tender offer for Airco stock (A741). BOC immediately began a study of the possibility of acquiring Airco by a competing tender offer. On July 25, 1973, BOC and Airco management entered into a written agreement that provided for the exchange of confidential financial information and contained a provision that neither company would make any offer for a period of five years to acquire any securities of the other without prior approval of the other company's board of directors (A4244-45).

On December 3, 1973, the Curtiss-Wright Corporation made a public tender offer for 2.4 million shares of Airco stock at $18 per share. Airco's board recommended to Airco's shareholders that they not accept it and asked them to wait to consider possible alternatives to that offer (A743). Airco's management on December 16, 1973, entered into an agreement with BOC in which Airco consented to BOC making a tender offer for Airco shares (A4258-60). The agreement provided for reciprocal representation by BOC and Airco on each other's board of directors and that Airco would have first right to purchase, or to designate a purchaser for, any Airco shares purchased by BOC which it subsequently should sell (A4259).

On December 10, 1973, BOC announced a tender offer through its subsidiary, BOC Financial Corporation, to purchase up to 4 million shares of Airco common stock at a price of $20 a share (A4355).

Airco's board of directors sent letters to Airco's shareholders informing them that Airco's board had consented to BOC's offer and that a closer association of Airco and BOC would be beneficial to the company (A4333).

At the expiration of BOC's tender offer on December 21, 1973, over 6 million shares had been tendered, of which BOC Financial Corporation subsequently purchased 4 million on a pro-rata basis. The cost to BOC of purchasing 4 million shares of Airco stock was $80 million plus estimated expenses of $2.8 million. The 4 million shares represented approximately 35 percent of Airco's outstanding common stock and gave BOC effective working control over Airco. (A744.)

Subsequently, Airco's board of directors was enlarged from 12 to 16 directors to provide for four representatives of BOC. In return, BOC invited Airco's chairman and its president to join BOC's board of directors (A744).

The combination of BOC and Airco has created the world's leading consortium in industrial "gas and gear" according to BOC's estimation (A5339, A5347). The consortium is substantially larger than L'Air Liquide, the next largest producer and marketer of industrial gases and related equipment in the world (A5347).

II. Industrial Gases

A. Nature of industrial gases and their production.

"Industrial gases" is a generic term referring to gases sold in compressed or liquid (and sometimes solid) form including acetylene, argon, carbon dioxide, helium, hydrogen, nitrogen,

oxygen, and other gases and mixtures. The term "industrial gases industry" is commonly used to refer to a distinct group of manufacturers who produce and market the principal atmospheric gases (oxygen, nitrogen, and argon) and acetylene and who may produce or purchase for resale other industrial gases (A745-47, A870). The term "industrial gases" as used in this proceeding does not include the common fuel gases such as propane, butane, propylene, and natural gas, all of which are considered part of the petroleum industry.

Industrial gases companies in this country market a broad range of industrial gases although each may not produce all of them. The industrial gases business consists basically of the heavy investment in air separation plants and such other gases as can be marketed profitably (A1473, A1125-27, A1278, A1287-88, A1649, A1775, A1837, A1843-44). Industrial gases companies market purchase and resell gases that they do not produce in order to provide their direct customers and their dealers with a "synergistic" or total marketing package (A1127-28, A1843). It is necessary for them to market a broad line of gases in order to compete effectively, as many customers prefer to purchase their total gases requirements from a single, reputable supplier (A1289, A1649, A1775, A2559).

There is also commonality in production techniques and transportation of industrial gases which require complex and specialized technical knowledge. For instance, the "atmospheric gases" are produced commercially by cryogenic (low temperature)

liquification and fractional distillation of air. Air consists of about 78 percent nitrogen, 21 percent oxygen, and 1 percent argon. Gases produced in air separation plants accounted for over 63 percent of the total value of all industrial gases shipments in 1972 as reported by the Bureau of the Census (A4891-92). Cryogenics technology is also used in the production of other industrial gases such as helium and hydrogen (A1183, A1187).

B. Tonnage and merchant segments of industrial gases market.

The industrial gases industry has two marketing aspects: tonnage and merchant. Tonnage refers to the supply to customers whose demand at a particular location is sufficient to justify the construction of a plant at or near the customer's facility, which is devoted entirely or primarily to providing that customer with a gases product delivered through a pipeline. Typical tonnage users include steel companies which use large amounts of oxygen in producing steel. Tonnage plants are commonly owned and operated by industrial gases companies with output sold under long-term contracts. Some customers, however, own and operate the gases plant. The only gases which are sold on a tonnage basis are oxygen, nitrogen, and hydrogen (A750, A870).

"Merchant" refers to other sales of gases, which take place in much smaller quantities, the gases being transported to the customer by truck or rail, either in bulk liquid form or in gaseous form in small metal cylinders (A749). It is common for on-site tonnage plants to have merchant capacity that is

incremental to that required to supply on-site users. Industrial gases sold to the merchant segment of the market are marketed through a network of independent distributors. (A749-50.)

C. U.S. industrial gases industry as a relevant market.

The ALJ and the Commission found that production and distribution of industrial gases by industrial gases companies constitute a single line of commerce and that the nation as a whole represents the appropriate "section of the country," or geographic market, in which to measure any adverse effects of the loss of BOC as a potential entrant (A872-73). Although BOC disputed both the definitions of the product market and the geographic market before the Commission, it does not challenge them on this appeal.

D. Concentration

The Commission found that the U.S. industrial gases industry is "highly concentrated" (A873). This is shown in the following table which includes the 1972 market shares of the leading firms based on f.o.b. plant value of shipments by all domestic plants classified in the industrial gases industry (Standard Industrial Classification 2813) by the Bureau of the Census (A4863). As the table shows, the top four firms accounted for approximately 70 percent of production and the top eight firms for over 80 percent.

Company	Value of Shipments ($1,000)		Market Share (%)
Union Carbide (Linde)	153,000		25.71
Air Products and Chemicals	106,976		17.98
Airco	93,577		15.73
Chemetron	60,496		10.17
Liquid Air	33,500	9/	5.63
Liquid Carbonic	29,651		4.98
Big Three Industries	24,699		4.15
Burdett (Cleveland)	12,680		2.13
Total of Top Eight	514,579		
Census Universe	595,000		
Top Four Concentration	414,049		69.59
Top Eight Concentration	514,579		86.47

(Source: A1133, A4863, A5692)

9/ Pro forma; includes value of shipments of two industrial gases companies acquired effective December 31, 1972 (A4915, A1434.)

E. Trend toward increased concentration in recent years.

From 1967 to 1972 there has been an increase in concentration in the U.S. industrial gases market. Four-firm concentration has increased from 67 percent to 70 percent and eight-firm concentration has increased from 84 percent to 86.5 percent between those years (A875).

F. Barriers to new entry.

There are substantial barriers to entry into the industrial gases market. Substantial capital is needed to build new production plants and, as the Commission noted, "[w]ith costs of new plant construction being higher today than in previous years, a new entrant would suffer a cost disadvantage insofar as competing in areas * * * that are supplied by established plants" (A878). An additional factor making *de novo* entry difficult, except for established foreign industrial gases firms such as BOC, is the need for technical know-how in the manufacturing of industrial gases. Cryogenic facilities which produce atmospheric gases are operated at very low temperatures and can be hazardous to employees and the surrounding community (A748-49). Lack of familiarity with cryogenic technology appears to be the reason why many steel companies prefer to have on-site plants operated by industrial gases firms (A878, A5564).

Marketing of industrial gases also requires an in-depth understanding of how gases are purified, their integrity maintained, and how to transport them. The equipment used is very specialized and used almost exclusively within the industrial gases

industry (A750). A firm needs an established reputation as a technically sound supplier of industrial gases before its products will be accepted in the marketplace (A1264, A3521).[10/]

III. Elimination of BOC as a Potential Competitor

A. Industry's perception of BOC as a potential competitor.

Prior to BOC's acquisition of controlling interest in Airco, BOC was the only one of the three largest industrial gases firms in the world that was not operating in the United States. L'Air Liquide, the largest industrial gases firm in the world prior to BOC's acquisition of controlling interest in Airco, had entered the U.S. market through its Canadian affiliate, Canadian Liquid Air, which acquired American Cryogenics and now operates in the United States as Liquid Air, Inc. (A1436).

BOC was recognized by executives of several leading members of the gases industry in the United States as one of the very few firms possessing the resources and technical know-how to successfully enter this country's gases market on a significant scale (A1150, A1160-64, A1248, A1300-05, A1461, A1512, A1602, A1797, A1799). Officials of the Linde Division of Union Carbide and Air Products, respectively the

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10/ The necessity of technical experience and capability for successful entry is demonstrated by the unsuccessful attempt of Exxon (then Standard Oil of New Jersey) to enter the U.S. industrial gases market by acquiring American Cryogenics, Inc. Exxon had no experience in this industry and eventually had to sell the company to Canadian Liquid Air, an industrial gases firm in Canada, owned by L'Air Liquide of France. At the time Exxon sold the company it was losing $4 million a year on sales of $20 million. Canadian Liquid Air subsequently turned American Cryogenics into a profitable operation. (A1436-39, A1444-45, A5543.)

number one and number two firms in the U.S. industrial gases industry, perceived BOC as the firm most likely to enter (A1163-64, A1305, A1308). The only other firms considered by any witnesses as possible entrants into the U.S. market were Messer Griesheim and Linde A. G., both of Germany, and AGA of Sweden (A1162, A1305, A1479).

B. BOC's incentives for future entry.

BOC's acquisition of Airco was motivated by a desire to expand BOC's international operations and gain exposure to United States technology relating to use of industrial gases.11/ BOC viewed the U.S. market as the largest industrial gases market in the world and also the most important and advanced (A2485, A3329, A3965-66, A4140-41). In the two years prior to the acquisition, the growth rate in the United States for industrial gases was substantial and was expected to continue at a high growth level for the next five years (A1158, A1459, A1488, A2761-62, A3505-09).

After the acquisition of Airco's stock, BOC's chairman of the board informed his company's shareholders that the acquisition enabled BOC to pursue its "long-term objectives" in this regard (A4814).

11/ At the hearing, BOC's board chairman acknowledged that "[t]he first reason" for acquiring stock in Airco "is that we have always been interested in the industrial gas market of America" (A2603). He characterized the United States market as the "most powerful and largest in the world [which] must be of continuing interest to any company which has ambitions to act internationally" in the industrial gases business (A1728). "[T]he American market, partly as a result of its size, is the source of much technology, much new development, and we [BOC] have to be in tune with that" (id.).

C. BOC's ability to expand into the U.S. market by de novo expansion or equivalent means.

BOC does not dispute that it had the financial, technological, and business ability to expand into the U.S. market (A1149-50). Of the 17 countries outside Great Britain that BOC has entered for the production and marketing of industrial gases, at least 12 were de novo entries and the other entries were by acquisition of small companies (A2562-66). The same marketing expertise BOC used in entering industrial gases markets throughout the world could be used by BOC in entering the U.S. market (A1150). BOC, in fact, already had the benefit and experience of participating in the U.S. industrial gases market from 1967 to 1971 through a joint venture with Airco in the marketing of industrial gases plants in this country, and it owned Harris Calorific Company, which manufactured medical gas equipment in this country (A129, A876, A2472-74, A1810, A3307).

D. Feasibility of entry--December 1973 and afterwards.

The record contains no evidence indicating that BOC was precluded from entering the U.S. market if profit opportunities beckoned. BOC entered the Canadian industrial gases market de novo after World War II and its Canadian gases subsidiary ("Canox") is now the third largest firm in that market (A2516, A2803, A3332). Other major producers of gases have entered industrialized foreign markets successfully without the need to buy an already-established market leader. For instance, Air Products and Chemicals, the second largest producer of industrial gases in the United States

entered Great Britain in 1957 as a _de novo_ entrant and subsequently expanded through competitive effort. By 1973, it held 25 percent of the industrial gases sales there (A1328-32). Air Products recently entered the Canadian market on a very small basis (A3497-3501).

As noted, L'Air Liquide entered the U.S. industrial gases market by a toehold acquisition in 1968 (A4921-22, A1444-48).

Experienced experts in the industry testified that they could see no technical or business impediment to _de novo_ entry in this country by a firm such as BOC. Thus, it was pointed out that BOC could compete for a long-term contract with a newly-built gas-consuming plant, which if secured, would allow it to build a facility not only for the base load customer but permit it to serve the surrounding industrial market (A1308-09). Or "they could acquire one of the smaller regional producers and add new capacity to that regional producer's production capabilities and expand their market penetration that way" (A1309). Also of course, it could combine these two forms of entry--building an air separation plant in an emerging new market area and purchase an established company to give it a source of back-up supply and entree into the merchant market (A1171-72). Also, it could enter by joint venture (see, _e.g._, A2070-78).

Although a BOC study concluded in February 1970 that "there is today no case for entering the USA industrial gas market" because of low profit margins, it cautioned that this conclusion 'should not be considered final. Opportunities could arise in

the future and a periodic review of the situation is recommended" (A5974). Subsequent to that report, BOC did in fact continue to take an interest by examining every acquisition possibility into the U.S. industrial gases market that came to its attention (A885-86).

By 1973 industry conditions had substantially changed as compared to 1970 (A1168, A1318). Shortages in the supply of some gases had developed in major areas of the country (A1353, A1461-62) and many important new applications for industrial gases in the United States were contributing to an increasing demand (A752-53, A889). A witness from Air Products testified that his company's sales increased 25 percent from 1972 to 1973 and the company had to tell customers it was unable to supply their requirements for new industrial gases plants (A3547). Linde had to allocate customers because of short supply of some air gases in parts of the country (A1152, A5188). Airco announced to its stockholders in 1974 that peak production had been maintained to keep pace with developing tightness in the industrywide supply of bulk-liquid gases products and there was "unprecedented demand" and record sales due to the new uses of industrial gases (A5286). See also A1706, A1792-93, A1845, A1847.

Prices for industrial gases have also increased (A1216, A1318, A1793, A2702, A3509). The price controls set by the Cost of Living Council, however, prevented industrial gases prices from rising as much as they would have had there been no controls (A1870). Likewise,

the profit returns were presumably lower than they would have been in the absence of controls. Now that price controls have been removed, the attractiveness of the U.S. industrial gases market for new entrants has undoubtedly increased.

E. The industrial gases market is in need of greater competition.

According to economic theory, in a high-fixed-cost industry leading firms are prone to avoid price competition (A900). The records indicates that this has happened in the industrial gases industry. As demand caught up with supply subsequent to 1970, prices became firm by 1973 (A3509, A1793, A5406). A BOC document states that at a private meeting in 1973, a representative of one of the three dominant U.S. industrial gases firms acknowledged to BOC that "the USA gas market has stabilised and that the three main competitors no longer encroach on each other's area of domination" (A5376).

The Commission found that entry by BOC by internal growth or its equivalent would be procompetitive as it would add an important new decision-maker to an industry already highly concentrated and becoming more so. New entry by an established and formidable competitor such as BOC would tend to put pressures on price leaders, forcing them to compete more vigorously in price or services in order to retain their existing market shares (A901).

IV. Anesthesia machines, vaporizers, and face masks.

At the time of the acquisition, Airco, through its Ohio Medical Products Division, was the leading seller of inhalation

anesthetic equipment in the United States (A5333-34). BOC through its two U.S. subsidiaries, Fraser Sweatman, Inc. and Harris-Lake, Inc., also marketed certain types of inhalation anesthetic equipment (id.) The particular inhalation anesthetic equipment relevant to this proceeding are: anesthesia machines, anesthesia vaporizers and anesthesia face masks, the Commission having found that competition was substantially lessened in these product lines as a result of the acquisition.

An "anesthesia machine," consists essentially of a cabinet and various anesthetic equipment attached to it which are used in administering anesthesia during surgery (A1976). Such equipment includes a vaporizer, flow meter and regulators, conducting tubes, face masks, rebreathing reservoir bags, and other items (A3048-49, A4363-68, A4434-36, A4457). Vaporizers and face masks are also sold separate from such machines and hence constitute product markets unto themselves when offered for sale (A4371-4405, A4421-24, A4467).

BOC and Airco were each substantial sellers in these three lines of commerce. BOC's and Airco's sales and market share in each category in 1972 were as follows (A906, A5333-34):

	Sales ($)	Market Share
Anesthesia Machines		
All	5,229,834	100%
Airco	2,413,231	46%
BOC	822,888	16%
Anesthesia Vaporizers		
All	1,109,951	100%
Airco	273,712	25%
BOC	579,495	52%
Anesthesia Face Masks		
All	1,170,623	100%
Airco	1,035,901	88%
BOC	36,275	3%

SUMMARY OF ARGUMENT

At the heart of the industrial gases portion of this case is the proposition that in this highly concentrated, oligopolistic industry new entry may provide an important, and perhaps indispensable, restraint upon the exploitation by dominant firms of their freedom from significant actual competition. A merger which appreciably reduces the chance of important new entry by removing one of only a very small group of possible entrants is, accordingly, cause for grave concern under the antitrust laws. Loss of BOC as a future entrant would be a permanent loss. There will be no other firm to step into its shoes in the foreseeable future. It takes highly technical know-how, experience, and much capital to start up even a modest industrial gases company.

Even if BOC would not have entered the market immediately or in the near future, the fact that it appears to await only an opportune moment to do so is significant. Injury to competition, therefore, may also be predicated upon the elimination of "the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter" United States v. Penn-Olin Chemical Co., 378 U.S. 158, 173 (1964).

In the relevant medical equipment markets--anesthesia machines, vaporizers, and face masks--substantial actual competition indisputably existed between BOC and Airco before the acquisition.

BOC's principal argument is that this part of the case was tried on the theory that these three product lines were part of a larger asserted product market ("inhalation anesthetic equipment"), and that the Commission could not properly consider whether competition was lessened in individual anesthetic equipment product lines. We will show, however, that the Commission properly considered these three product categories as lines of commerce and that, in any event, BOC fails to indicate how it has been prejudiced by the Commission's findings that they are lines of commerce.

ARGUMENT

Introduction

Although paying lip service to the substantial evidence rule,[12/] BOC attempts to draw this Court into a de novo review of the record. Thus it states at the outset of its "Argument" (BOC Br. 42);

> The record contains almost no disputed issues of fact. This Court therefore is as able to consider the record as was the Commission.

12/ Section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), provides that the "findings of the commission * * * as to the facts, if supported by substantial evidence, shall be conclusive". See also 15 U.S.C. § 45(c). Similarly, the Administrative Procedure Act provides that agency findings shall be set aside only if unsupported by "substantial evidence." 5 U.S.C. § 706.

But the law is clear that under the substantial evidence rule the court's function is not to make its own independent appraisal of the record and choose among conflicting inferences from undisputed facts. FTC v. Algoma Lumber Co., 291 U.S. 67, 73 (1934); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 63 (1927).

When the Administrative Procedure Act was enacted, proposals to adopt a "weight of evidence" test for the explicit purpose of expanding judicial review of agency findings were rejected by Congress in favor of the traditional substantial evidence test which had been held to mean "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." 13/ Universal Camera Corp., v. NLRB, 340 U.S. 474, 477, 480 (1951). See also Consolo v. FMC, 383 U.S. 607, 619-20 (1966).

Although we believe that if it were the fact finder this Court would reach the same conclusions the Commission reached, even if the Court were to weigh the evidence differently it should not disturb the Commission's findings as they are supported

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13/ To be insufficient to support a verdict, "the evidence must all be one way from which only one reasonable inference can be drawn," United States v. Hess, 341 F.2d 444, 448 (10th Cir. 1965).

It has been suggested that an agency finding should not be set aside unless it rests on evidence which "carries its own death wound" or is contrary to evidence which "carries its own irrefutable truth." NLRB v. Pittsburgh S. S. Co., 337 U.S. 656, 660 (1949).

by substantial evidence. The reviewing court is not to "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera Corp. v. NLRB, supra, 340 U.S. at 488.[14/]

BOC also misstates the law when it argues that it must be shown by the "clearest proof" that BOC would have entered the industrial gases market had it not acquired Airco (BOC Br. 14). In urging this standard, BOC completely ignores the decisional law under Section 7 of the Clayton Act which holds that the only requirement is a showing that there was a reasonable probability of such entry.

On the question of whether the removal of a probable future entrant can alone violate Section 7 of the Clayton Act, BOC correctly notes that the Supreme Court has expressly

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14/ BOC cites Professor Jaffe's observations that the evidence must be reviewed, not in isolated pieces, but in the context of the whole record (BOC Br. 74)--a proposition that cannot be disputed. But Professor Jaffe also cautioned:

> [I]t is understandable that some judges may feel that they are called upon to "weigh the evidence." The judge must, therefore, be vigilantly aware of what he is doing and stop short of such an exercise of power. Once he has determined that there is a reasoned probability of the fact found by the agency he is functus officio. It matters not that the whole record would support a contrary inference or that in the opinion of the court the contrary inference is more probable or even much more probable. The court may not weigh the worth of competing inferences.

Jaffe, Judicial Control of Administrative Action 602 (1965).

reserved decision on the point. However, BOC ignores the line of lower-court and FTC decisions that have dealt with the question and have unanimously held contrary to the view BOC urges this Court to adopt.

In short, BOC attempts to give the erroneous impression that the Commission's decision raises new legal issues never before decided by any court, whereas in fact the Commission's decision is in full accord with existing judicial precedent.

Before taking up the legal issues, however, we will first respond to BOC's contention that the record will not support a conclusion that BOC was a potential entrant into the U.S. industrial gases market at the time of the acquisition.

INDUSTRIAL GASES

I. Substantial Evidence Supports the Commission's Finding that as of December 1973 There was a Reasonable Probability That BOC Would Eventually Enter the U.S. Industrial Gases Market Other Than by Acquisition of Airco.

A. <u>BOC's arguments are centered on events that took place before conditions changed in the U.S. gases market</u>.

BOC does not dispute that in 1973 and afterwards it had the ability--both financial and technological--to expand into the U.S. industrial gases market. It also concedes that it has always regarded the United States as being "of continuing interest," both as a source of technology and expertise and as a "possible area of expansion" in industrial gases (BOC Br. 30).

The principal basis for BOC's argument that it was not a potential entrant at the time of the acquisition is that, after an on-site study of the American industrial gases market, BOC's management agreed with the study's conclusion that "there is today no case for entering the USA industrial gas market as a producer for either on-site supply or merchant requirements" (A5974; emphasis added). (This study is referred to as the "Perham-Greenfield report" in BOC's brief).

This conclusion, however, was not intended to be the last word. In fact there is no documentation that BOC's top management adopted the report's recommendation. The report itself added that "opportunities could arise in the future and a periodic review of the situation is recommended." (A5974). This report was completed in February 1970, a time during which the U.S. industrial gases industry was still suffering from the consequences of over-expansion of production capability that occurred during the previous decade because of needs of the then thriving U.S. space program and other factors (A2701, A2750-51, A2920, A4068-70, A5595). Even Airco was not considered a favorable acquisition candidate by BOC at that time (A5978). By 1973 supply and demand conditions had reversed. Instead of supply exceeding demand, demand was exceeding supply in important areas of the gases industry and American firms were at peak production (supra, p. 22).[15/]

15/ BOC states that shortages in the merchant market were limited to 1-2% in certain areas of the country. This estimation comes from an Airco representative (A2697). Executives of four other companies testified that the shortage in merchant and tonnage supply was more serious (A1151, A1353, A3509-13, A1706, A1792-93).

The prognosis for the future was very optimistic among sellers (A1306, A1318, A1353, A1845-47, A3502, A3505).[16/]

This change in condition was due in large part to the emergence of new applications for industrial gases. The elevated price and shortage of petroleum products in 1973 led to the increase of industrial gases for use in the production of synthetic natural gas or low-BTU gas that can be used for commercial purposes or in power generation. The elevated price of oil has also led to the production of gas for pipeline transmission by the combustion of coal with oxygen and this has led to the requirement for large oxygen plants to be built over the next several years (A3502). Additionally, industrial gases are now being used to generate basic feedstock for a number of chemical products such as fertilizers and methanol (A3510). The scarcity of natural gas (the basic feedstock for ammonia) has also made economically prohibitive the use of ammonia for generating nitrogen for metallurigical processes, in turn further increasing the demand for nitrogen produced by air separation (A3511).

Other new applications have been the development of nitrogen food freezing and the use of industrial gases in sewage treatment (A1654, A1846, A5408). Also the high price of scrap metal has resulted in steel companies using liquid pig metals to produce more steel rather than melting scrap. This has increased the requirement of steel companies for oxygen (A3504).

16/ BOC requests that this Court take judicial notice of the fact that a recent Census Bureau publication shows that production of gases slumped in 1975 (BOC Br. 27). 1975 was, of course, a recession year for the entire national economy. There is no reason to assume that production of gases will not pick up as general economic conditions improve.

In contrast to the relatively depressed prices during the 1960's that led to the pessimistic conclusions of the Perham-Greenfield report, prices later firmed up (A1318, A1845, A3509). By June 1973, Airco was telling BOC that Airco's industrial gases business was now faced with new investment potential for the next 5 years as demand was running ahead of supply, "a complete reversal of what had happened in the past five years" (A5361).[17/]

Rather than confront the facts as they existed at the end of 1973 when the acquisition occurred, BOC devotes its arguments to events that took place well before then (BOC Br. 31-38).[18/] Its only reference to events in 1973 is the fact that BOC prepared a five-year planning forecast in 1973 of capital to be employed in the western hemisphere. BOC argues that since the forecast did not refer to the possible use of funds for building an air separation plant in the United States, BOC could not have been a potential entrant

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17/ This turnabout was confirmed by other witnesses. Air Products Company's sales of industrial gases increased 25 percent from 1972 to 1973 (A3558-59). Air Products had to tell customers that it was unable to supply their requirements for new gases plants (A3547). Linde Division of Union Carbide had to allocate customers (A1152) and Union Carbide told its stockholders that demand for industrial gases was "exceptionally strong in 1974, and exceeded Union Carbide's ability to supply even at capacity operation" (A890). Chemetron was operating at full capacity for air separation gases at the time of the hearing (A1847).

18/ The Commission pointed out three instances that took place soon after the Perham-Greenfield report of February 1970, where BOC investigated the possibility of acquiring toehold U.S. industrial gases firms (A885-86 and n. 16). BOC chides the Commission for "flailing away at a straw man," stating that "[w]e have never suggested that BOC closed any door as a result of Perham-Greenfield" (BOC Br. 37-38). BOC overlooks that in its Proposed Findings submitted in the Commission's proceeding, it had urged the unqualified finding that the "Perham-Greenfield report closed the door on the United States for BOC" (A455).

in the foreseeable future (BOC Br. 38). But such a forecast would not necessarily have allocated funds for entry into the U.S. industrial gases market in any event. BOC's managing director testified that BOC does not always include the cost of future expansions in budget forecasts (A3341-43). He observed, "[q]uite obviously in any large business you can't read the future a few years out" (A3395).[19/]

B. Attractiveness of Entry by 1973 and Later.

The Commission recognized that "[a]n important ingredient of feasibility of entry is, of course, whether reasonable profits could be anticipated which would justify the expenditures necessary for BOC to make a de novo toehold entry" (A888). The indications are clear that the industrial gases industry was experiencing a rapidly increasing rate of return after 1970,[20/] and BOC was fully cognizant of this development.

19/ Thus, BOC's 1970 budget forecast for international development did not anticipate that in 1972 BOC would in fact make direct entry into the U.S. by acquiring Harris-Lake, Inc., an inhalation anesthetic equipment company (A5992, A789-90). Also, BOC in 1970 and 1971 authorized acquisition discussions of U.S. industrial gases firms (infra pp. 45-47) notwithstanding the lack of any provision for any acquisition in the United States in the 1970 budget forecast for 1970-1973.

20/ Business Week, March 24, 1975, at 62, reported 1974 consolidated rates of return on common equity of publicly held gases companies as follows: Air Products--20.7%; Airco--12.1%; Big Three Industries --18.0%; Chemetron--12.8%. The "all-industry" composite figure was 14.0%. Id. at 91.

(Cont'd on next page)

Airco's experience bears this out. Airco's profit figures showed that its rate of profitability doubled between 1969 and 1971 (A5386 in camera). In a statement to shareholders during the first quarter of 1973, Airco's management stated "the 1972 earnings performance of our Industrial Gases, Welding Products and Electronics Divisions was outstanding" (A4234). Airco's president told BOC in June 1973 that "Airco's activities were now 'highly profitable' and demand for industrial gases was running ahead of supply" (A5361). Also a composite calculation of the rate of return on sales and return on gross investment derived from data supplied to the Commission by three gases firms showed a rapid increase in profits between 1970 and 1972 (A6003).

The most telling evidence of the profitability and expectation of future profitability was BOC's actions. BOC was willing to invest $80 million of borrowed funds on which it had to pay substantial interest (10 percent per annum) to acquire its interest in Airco (A744). BOC therefore must have anticipated an attractive rate of return in the industrial gases market. Indeed, BOC's internal documents reveal

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Although consolidated rates of return of industrial gases firms which engage in other lines of business do not directly show the rate of profitability of the industrial gases part of their business, they are nevertheless often informative. The record indicates that industrial gases are usually more profitable than other products sold by industrial gases producers (A757, A4581). Therefore, the overall rate of return of these companies is probably less than the rate of return on industrial gases. BOC apparently realized this as it looked at similar profit rates reported on a consolidated basis of U.S. industrial gases firms when considering entry in June 1973 and it considered them to be acceptable (A5339).

the company's expectation of rising levels of profitability in the U.S. industrial gases market. A BOC staff document drafted in June 1973 for consideration by BOC's management advised that the general level of profitability in the leading industrial gases firms in the USA was poor throughout the 1960's. However, it stated "There is evidence that it is improving now and likely to establish a better plateau for the middle/later 1970's" and that "skilful managements earned acceptable returns" (A5338-39). It noted instances of U.S. industrial gases firms ranking high in profit returns among American leading corporations according to <u>Fortune</u> magazine (<u>id</u>.).

BOC's argument that it was denied the opportunity to present profitability statistics on cross-examination of industry witnesses (BOC Br. 47 ftn.) is without merit. Although granted wide latitude by the ALJ on cross-examination, BOC was restrained from entering this area only because it was outside the scope of the area examined on direct (A1220-22). BOC was in no way prevented from calling industrial gases company representatives as its own witnesses and obtaining such information. Adherence to conventional trial procedure was not error.

Likewise BOC was not prejudiced by the Commission's treatment of BOC RX 254 (BOC Br. 48 ftn.). BOC RX 254, placed in evidence by BOC, is a composite average of three gases firms' profit margins showing what might appear to be a relatively low return on investment

in the years 1970, 1971, and 1972 (A6003). See also (A1152). The Commission found that the profit rate was understated as compared to common methods of stating rates of return. This was because investment was calculated on the basis of "gross fixed plants and equipment," which in common accounting parlance means that the assets were valued without taking depreciation into account (A900 n.27).[21/] Although BOC now queries that interpretation, BOC was responsible for the exhibit and it could have sought clarification, if it really needed it, at the time it received the exhibit from the independent accounting firm which prepared it (A317-18) or when it introduced it into evidence (A3476-79).

Nor was there any error in the Commission's ordering so-called "Mississippi River" in camera treatment to sensitive profit data underlying BOC RX 254 since the third parties provided the data under expectations of confidential treatment (A149-277).[22/] See FTC v. Crowther, 430 F.2d 510 (D.C. Cir. 1970).

21/ See, e.g. Kohler, A Dictionary for Accountants 214 (4th ed. 1952).

22/ "Mississippi River treatment" means that the underlying profit data is given to a disinterested accounting firm selected by the parties, which then compiles the material in such a way that no individual company's data is revealed. Mississippi River Fuel Corp., 69 F.T.C. 1186, 1189 (1966).

The question whether the level of profitability was sufficient (or would become sufficient) to attract BOC to enter by means other than the acquisition of Airco cannot be ascertained with absolute certainty. However, the clear trend by the time of the acquisition was, as we have shown, one of increasing profits[23/] and a growth in demand for gases and new gases plants. By the time of the Commission's hearings in this matter in 1974, the market was being described as "buoyant" (A3502) and some members of the industry were anticipating a yearly growth rate of up to 10 percent compounded annually over the next five years (A3505, A1845-47). Airco was forecasting a 10 percent growth for its business (A5369).

The Commission, in assessing the question of likelihood of entry, was justified--indeed required--to examine conditions and trends as they existed at the time of the acquisition. United States v. Marine Bancorporation, 418 U.S. 602, 642 (1974) ("[C]ourts should look * * * to the size and growth prospects of the target market * * *.").

23/ BOC claims that "costs concededly were rising at least as fast as prices" (BOC Br. 51). But the testimony it cites to this effect did not relate to average unit costs, only the fact that general operating costs were rising (A1869-70). As the Commission noted, BOC conceded "that there is no question that economies of scale in tonnage plants have led to lower unit costs" (A898; see also A2920, A5369). The predominent part of industrial gases production in this country is from tonnage plants (A4891).

The Commission's finding that there was reasonable probability that BOC would eventually have entered the market is supported by the fact that BOC was motivated to expand internationally and to have a presence in the United States. Its planners stated (A3974):

> Despite the very large size of markets in the USA, the main purpose of a series of BOC ventures over the next, say, five to ten years would be commercial, managerial and technical "exposure" rather than for the sake of the business itself.

The attractiveness of the U.S. market for exposure to American technology was reiterated in the testimony of Mr. Leslie Smith, BOC's board chairman:

> Q. There was reference in one of the documents which you identified and which was received in evidence, and indeed there was reference in your earlier testimony to BOC's ambition to be ever more international, ever more multi-national.
>
> Did that play a role in this decision?
>
> A. Yes.
>
> I don't believe that one can really claim to be a multi-national company without operating in the North American market. [A2488]
>
> * * *
>
> Q. What was the purpose in acquiring the stock in Airco?
>
> A. I think as a matter of fact, I have given this in my testimony yesterday, I am very happy to go through it again.
>
> The first reason is that we have always been interested in the industrial gas market in America. While there is no virtue attached to the claim of being an international company, there are nevertheless benefits which can be obtained by being an international company, and quite clearly, those benefits are diminished if we don't have a position in North America. [A2602-03]

Although claiming that BOC would not have entered the U.S. industrial gases market de novo or by toehold acquisition, Mr. Smith acknowledged that BOC has entered many industrial gases markets in the world on a de novo or toehold basis (A2563-65) and that in Brazil BOC recently entered on a de novo basis with a 240-tons-per day air separation plant even though it did not have any assured merchant business (A2566). Such capacity is typical of the size currently built in this country (A1338).

C. Feasible alternative means existed for BOC to enter the U.S. Industrial gases market other than by acquisition of Airco.

The Commission found that BOC could have entered the U.S. industrial gases market in any of several ways: It could have entered by bidding on a tonnage plant, it could have added incremental capacity to the tonnage plant for sale in the merchant market, it could have entered into a joint venture, or it could have entered by acquiring one or several small producers of industrial gases (A780, A887-88). That finding is supported by expert testimony (A1308-09, A1171-72). 24/

In disputing these findings, BOC claims it would never have entered the U.S. market but on a national scale and that

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24/ BOC states that the president of Chemetron's industrial gases division testified that he did not believe that BOC could enter the U.S. market de novo (BOC Br. 49) (A1861-62). A few pages later the witness explained, however, that he meant BOC could not enter on a national scale by de novo means alone. He believed BOC could enter this country on a regional basis (A1871-72).

this would cost about $240 million (BOC Br. 48). The Commission rejected this contention, as it was based solely on self-serving testimony by BOC's chairman and no reasons were presented as to why BOC would have to enter on a national scale (A887). The Commission, noting that L'Air Liquide had successfully entered the U.S. market through the purchase of a small regional firm in 1968 and subsequently constructed gases plants in different areas of the country (A882), said: "We have difficulty in perceiving why this international firm * * * was able to enter on such a modest scale, yet BOC could not. The record indicates the existence of many small companies which could presumably be purchased in similar fashion" (A887; A858, Finding 112).

Nevertheless, BOC continues to argue that neither de novo entry or toehold acquisition were feasible methods of entry. The record does not support this contention.

1. De Novo entry.

BOC argues that de novo entry would be too expensive (BOC Br. 46, 48). But its argument is based on the supposition that de novo entry would not be feasible unless BOC duplicated Airco's existing 19 air separation plants scattered across the country (BOC Br. 46). No reasons are advanced as to why, in times when construction of new plants are lagging behind demand (as they had been in 1973-74), it would not be economically feasible for BOC to bid for the construction of new plants to supply the increasing demands as existing American firms were doing (see, e.g. A1353-54, A1859). A typical tonnage plant costs $7-8 million (A1338, A1363-64, A1864). Therefore, for much less than the $82.8 million it cost

BOC to acquire 35 percent interest in Airco, BOC could have built several air separation plants, and thus effectuated "multi-plant entry" which BOC claims is necessary to assure "backup" to customers (BOC Br. 46).[25/]

The facts here are distinguishable from those in Missouri Portland Cement Co., v. Cargill, Inc., 498 F.2d 851 (2d Cir.), cert. denied, 419 U.S. 883 (1974). In that case there was no objective evidence that expansion of Cargill's business (e.g., grain trading and salt mining) pointed in the direction of cement production. "Cargill's interest was simply in further diversification and in profitable use of its capital * * *." Id. at 859. The acquisition in Missouri Portland was thus neither a product nor a geographical market extension merger and there was no reason to believe that, but for the acquisition of Missouri-Portland, Cargill would have entered the cement market in some other manner. In contrast, in the instant case, there is no dispute that BOC had the incentive to find means to enter the U.S. industrial gases market. It is also clear that it was one of only a few firms outside the market that had the technical ability to enter the U.S. market de novo.

2. Toe-hold entry.

BOC's principal argument with respect to the Commission's finding that toehold acquisition was a feasible alternative means

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25/ BOC argues that long-term existing distribution arrangements would make entry difficult. But, as the Commission found, "BOC can compete for the new market demands which the record indicates existing firms were unable to satisfy." (A781)

of entry is that the Commission did not find that existing toehold firms were "attractive" prospects available for acquisition on any "reasonable basis" as of the time of the acquisition (BOC Br. 53).[26/]

In this connection the Commission had rejected as unrealistic BOC's argument that complaint counsel had the burden of showing that existing toehold companies were not only available, but were available for purchase by BOC on a "reasonable basis" in December 1973 (A887, A781). The Commission did find, however, that "the record does establish that there are small companies in the industrial gases market and that they are available for acquisition now or would be in the future * * *" and presumably would be available for purchase by BOC (A781).[27/]

Clearly as the Commission held, it would be unrealistic to establish the precise terms under which BOC could have acquired any of

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26/ BOC professes difficulty with understanding the Commission's findings with respect to availability of toehold firms (BOC Br. 60-61). The difficulty lies with the fact that BOC misstates the Commission's findings. The Commission did *not*, as BOC claims, vacate the ALJ's finding that there were specific small U.S. producers "available for acquisition". What it deleted was a sentence in Finding 112 that there were a number of "*attractive*" small producers available for purchase at the time of the acquisition. The Commission found instead that "the record does not establish whether they would be good investments or bad investments. Such a burden would be unrealistic" (Finding 115, A781). See also Opinion at A887 which is fully consistent with these modified Findings.

27/ The companies referred to by the Commission and the record support for the finding that they were or would become available are: Burdett of Cleveland (A1510), Burdett of Norristown (not related to the other Burdett company) (A1707), and Northern Gases and Supply Company (A1655, A1665). Burdett of Norristown was in fact later acquired (in October 1975) by the German industrial gases firm Messer Griesheim (documentation on file with the FTC).

these firms.[28/] Furthermore the experience of L'Air Liquide in entering the market by purchasing American Cryogenics (supra, p. 18) shows that even a money-losing toehold can be an "attractive prospect" for an international firm desiring to expand in the U.S. market.

BOC relies upon language in this Court's decision in Missouri Portland Cement, supra, that Missouri Portland had "failed to demonstrate that attractive toehold prospects were available" (498 F.2d at 864). The quoted language, we submit, when read in context, refers only to the failure of Missouri Portland to show the existence of any possible attractive toehold firms. Cf. Kennecott Copper Corp., 78 F.T.C. 744, 927 (1971), aff'd, 467 F.2d 67 (10th Cir. 1972), cert. denied, 416 U.S. 909 (1974)("With 68 producers in the industry in 1967, there obviously were smaller firms than Peabody which could have been considered as viable acquisition candidates.") [29/]

D. BOC's documentary evidence supports the Commission's findings that BOC was a probable entrant.

BOC argues that despite any objective evidence supporting the Commission's finding that BOC was a likely future entrant into the

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28/ Contrary to what BOC represents, the Commission did not specifically find that Liquid Carbonic and Big Three Industries of Texas were likely toe-hold acquisition candidates (BOC Br. 52-55). BOC's extensive arguments regarding nonavailability of these firms are therefore beside the point since other smaller firms were available.

29/ Cf. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963): "[W]e must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation * * *. And so in any case in which it is possible without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration."

U.S. market, BOC had in fact decided long before the Airco opportunity presented itself that entry into the U.S. market was not feasible.

Documents obtained from BOC's files do not support this contention. As detailed in the Commission's findings (A768-72, A856-58), BOC actively pursued several possible means of entering the U.S. industrial gases market prior to the Airco acquisition.

BOC set about to expand into the U.S. industrial gases market in the summer of 1969. In August 1969, its Group Managing Director announced to BOC's personnel: "As part of its declared policy to become more truly international, BOC seeks profitable opportunity to extend its operations in the world's most important and advanced market - North America" (A3965). Later, in September 1969, BOC decided to limit its expansion in North America to the United States. (A4002). BOC gave foremost priority to its industrial gases business in its efforts to expand into the United States as this was the area where it was "most experienced." (A4140, see also A4794.) BOC then directed the president of its industrial gases subsidiary in Canada to assume responsibility for expanding BOC's operations in the United States and ordered Dr. Muller, a U.S. industrial gases expert, to assist in this effort. (A3965) 30/

30/ Dr. Muller had been exploring business opportunities for BOC in the U.S. since 1968 (A768, A4281). By October 1969, Dr. Muller, on behalf of BOC, had already contacted several small U.S. industrial gases companies for the purpose of using them as vehicles for entry (A769). In October 1969, Dr. Muller was directed by BOC to terminate all activities other than pursuing opportunities for entry by BOC into the U.S. industrial gases market (A4006, A4796).

In November 1969, BOC's planning group completed a detailed study of the U.S. industrial gases market. Two weeks later, BOC's Board of Directors ordered that an extensive on-site investigation of the U.S. industrial gases market be conducted in order to find opportunities for entry. (A5153-56)

A report on BOC's on-site search was completed in February 1970. The report ("Perham-Greenfield report") concluded that the existing U.S. market conditions in early 1970 would not enable BOC to realize a 15 percent pre-tax return on capital employed. The report recommended that BOC not enter the market at that time, but continue to look for opportunities to enter in the future when market conditions improved (A5974). BOC did exactly as this report recommended - it continued to review opportunities for entry into the United States industrial gases market.

Thus, in April 1970, an investment banker approached BOC and advised that a 50 percent interest in Burdett Oxygen Company of Cleveland was available. Although BOC noted that profits of the firm were negligible and that it did not appear a very attractive proposition, BOC nevertheless responded there was a possibility that it would be interested, but that an essential precondition to further study would be that BOC could obtain control (A4785-88). After learning that control was not available, BOC told the banker it was not interested but if the situation changed it "could be interested" (A4790).

Also, in August 1971, BOC's managing director discussed with Charles Perkins, president of Burdett of Norristown, Pennsylvania

(which has no connection with Burdett of Cleveland) a proposal by Perkins that BOC acquire Burdett and a number of other small independent gases companies. A memorandum of the conversation (which took place at BOC's offices in London) was made by the BOC official and copies were sent to other top BOC officials including the chairman of the board of BOC (A4799-4801, A1711-12). Soon afterwards, BOC sent an executive to the United States to look over the company. The visit lasted three or four days during which the BOC representative made a thorough inspection of the books and records as well as of the physical plant. Discussion and consideration was given to BOC's purchasing Burdett-Norristown and a group of other non-major industrial gases companies to effectuate a toehold entry into the U.S. market (A5608-25, A1713-14)

Despite the visiting official's optimistic view of the company,[31/] BOC later informed the president of Burdett that BOC had decided it was not then interested in acquiring the company. Although BOC's letter evinced lack of interest at that time in an acquisition, it concluded that BOC was aware of the "sort of

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31/ The BOC official recommended to his superiors in a memorandum that (A5610):

> If it is agreed both that BOC should make an entry into the industrial gases market in the USA and that this type of entry be adopted (from the small end upwards in the Canox manner), then Perkins, Burdett, and the group he proposes would in principle be a likely route * * *. The company he runs, if not financially healthy, have a reasonable trading foothold and can probably be made healthy. The other independents may well agree to his plan and his claims are broadly borne out by first checks.

profits which can be made in the U.S. market and [we] are keenly interested to improve this awareness" (A4292).

BOC's representatives also had negotiations in 1970, subsequent to the Perham-Greenfield report, with an American helium firm concerning a possible acquisition (A886, A1590-99, A1628, and see A3861-95).

These acquisition discussions are clear support for the view that BOC was a potential entrant waiting at the edge of the market for opportune entry conditions.

At the hearing, BOC's executives testified that after receipt of the 1970 Perham-Greenfield report, BOC conclusively decided against expansion into the U.S. industrial gases market in the foreseeable future (A3324-25, A2498-2501). The ALJ (A773, A876) and the Commission (A890-91) held that this testimony was not convincing in view of the documents demonstrating BOC's continuing interest in studying this country for entry possibilities and the objective evidence pointing to BOC as a potential entrant.

The Commission's finding that the subjective statements of BOC officers were entitled to little weight in light of contrary evidence was fully justified. Such statements are self serving and at best represent only transient views of management subject to change in light of new conditions. For an extensive discussion of the lack of reliability of such statements in potential competition cases, see Justice Marshall's separate opinion in United States v. Falstaff Brewing Corp., supra, 410 U.S. at 548, 563-70. See also United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1964)

("Potential competition cannot be put to a subjective test"). The appropriateness of relying on objective evidence, rather than subjective statements of future intent has also been pointed out by a distinguished panel appointed by the President to study the antitrust laws. See the "Stigler Task Force Report" (President's Task Force Report on Productivity and Competition), (1969), 5 CCH Trade Reg. Rep. ¶ 50,108 at 55,136 ("The identity of potential entrants should not be established by introspection"). See also Narver, Supply Space and Horizontality in Firms and Mergers, 44 St. John's L. Rev. 316, 328 (Special ed. 1970).

Two examples vividly illustrate the unreliability of subjective testimony on this issue. In 1963, the Humble Oil & Refining Company entered into an agreement to purchase the assets of Tidewater Company as a means of entering the California gasoline market. When faced with the prospect of a government antitrust action challenging the acquisition, Humble represented that if precluded from consummating the agreement with Tidewater, it would not attempt to enter the market de novo. Nonetheless, within a few months after Humble withdrew from the acquisition agreement in the face of a government antitrust suit, Humble's management initiated a $300 million program of unilateral expansion into the California and West Coast markets. See United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1247 (C.D. Cal. 1973), aff'd without opinion, 418 U.S. 906 (1974).

Similarly, when the Justice Department challenged Bethlehem's acquisition of Youngstown Steel in United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958), Bethlehem vigorously

argued that it would never enter the Chicago steel market _de novo_. _Id_. at 616. 32/ Yet when the merger was enjoined, Bethlehem proceeded to enter the market on its own. See _Falstaff_, _supra_, 410 U.S. at 568 n.20 and Singer, _Antitrust Economics_ 133 (1968).

II. The Question Reserved in _Falstaff_ and _Marine Bancorporation_ Should be Resolved in the Commission's Favor in this Case.

In _Falstaff Brewing Corp._, _supra_, the Court made it clear that a merger between potential competitors may lessen competition within the meaning of Section 7 if the effect is to eliminate a present beneficial influence on a market resulting from the "outside" company's position as a perceived potential entrant. The Court remanded the case for an assessment by the trial court of this possibility. In doing so it declared that it was "leaving for another day" the question of the applicability of Section 7 to

> a merger that will leave competition in the market place exactly as it was, neither hurt not helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter _de novo_ or through "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner. [410 U.S. at 537.] 33/

32/ Bethlehem made arguments strikingly similar to those made by BOC, _e.g._, that the construction of a new plant in Chicago would be too costly and was not economically feasible. It estimated the cost would be $750 million as compared to $358 million for expansion of Youngstown's existing plants. Judge Weinfield rejected the argument that Bethlehem could not enter on its own, recognizing:

> It is undoubtedly easier and cheaper to acquire and develop existing plant capacity than to build entirely anew. Each defendant in urging the merger takes a dim view of its ability to undertake, on its own, a program to meet the existing and anticipated demand * * *. [_Id_. at 616].

33/ Footnote on following page

Subsequently, the Department of Justice in United States v. Marine Bancorporation, 418 U.S. 602 (1974), asked the Court to rule on the question left open in Falstaff. The Court's opinion sets forth three prerequisites that must be shown before "the doctrine comes into play": (1) A concentrated market that is not performing competitively (id. at 631); (2) The acquiring company has available feasible means for entering the market other than by acquiring a leading company, and (3) A showing that "those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects" (id. at 633).34/

The Court found the latter two prerequisites were not met in that case and stated (id. at 639):

(Footnote from previous page)

33/ The Court observed (id. at 537):

> There are traces of this view in our cases, see Ford Motor Co. v. United States, 405 U.S. 562, 567 (1972); id., at 587 (Burger, C.J., concurring in part and dissenting in part); FTC v. Procter & Gamble Co., 386 U.S., at 580; id., at 586 (Harlan, J., concurring); United States v. Penn-Olin Chemical Co., 378 U.S., at 173, but the Court has not squarely faced the question, if for no other reason than because there has been no necessity to consider it.

34/ As noted supra, pp. 6-7, the Commission found that each of these prerequisites were present in this case and, as this brief demonstrates, the Commission's findings are supported by substantial evidence.

> Accordingly, we cannot hold for the Government on its principal potential-competition theory. Indeed, since the preconditions for that theory are not present, we do not reach it, and therefore we express no view on the appropriate resolution of the question reserved in Falstaff. We reiterate that this case concerns an industry in which new entry is extensively regulated by the State and Federal Governments. 35/

Although the Supreme Court has thus stated that it has never squarely decided the question, 36/ the Commission and a number of courts have held that elimination of a "probable future entrant" may violate Section 7.

Indeed this is the principal basis of the Commission's strong stand, initiated the 1960's, against geographic market-extension mergers by large dairy companies. See, e.g., Beatrice Foods Co., 67 F.T.C. 473, 720-22 (1965); FTC Enforcement Policy with Respect to Mergers in the Dairy Industry. 1 CCH Trade Reg. Rep. ¶ 4532. 37/ The Commission has recognized

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35/ There are no laws restricting entry into the industrial gases market in this country that are analogous to those impeding entry into banking in most parts of this country.

36/ But see United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964), complaint dismissed on remand, 246 F. Supp. 917 (D. Del. 1965), aff'd by an equally divided Court, 389 U.S. 308 (1967), discussed infra at pp. 56-57, where the Court sanctioned the theory in the context of a joint venture.

37/ A number of Commission orders were subsequently obtained against leading dairy companies during the 1960's which prohibited them from making market extension acquisitions for a period of 10 years. An evaluation of the results of these orders by the Commission's Bureau of Economics concluded that "[t'he Commission's policy, adopted in the Beatrice case, has resulted in a significant reduction of merger activity away from the largest dairies with the result that national concentration has declined since the mid-1960's." Economic Report on the Dairy Industry 10 (Federal Trade Commission 1973).

the doctrine in a number of other cases. See Bendix Corp., 77 F.T.C. 731, 817-19 (1970), rev'd and remanded on other grounds, 450 F.2d 534 (6th Cir. 1971); Beatrice Foods Co., 81 F.T.C. 481, 528 (1972); General Mills, Inc., 83 F.T.C. 696, 732 (1973); The Budd Co., CCH Trade Reg. Rep. ¶ 20,998 (1975); See also the Commission's Enforcement Policy with Respect to Mergers in the Food Distribution Industries and Enforcement Policy with Respect to Product Extension Mergers in Grocery Products Manufacturing. 1 CCH Trade Reg. Rep. ¶¶ 4525, 4530.[38/]

Likewise a number of courts have applied the actual potential entrant doctrine. United States v. Phillips Petroleum Co., supra, 367 F. Supp. at 1232 (C.D. Cal 1973), aff'd without opinion, 418 U.S. 906 (1974); United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 147 (N.D. Cal. 1966), aff'd without opinion, 385 U.S. 37 (1966); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 77-78 n.8 (10th Cir. 1972); Ekco Prods. Co. v. FTC, 347 F.2d 745, 752-53 (7th Cir. 1965); United States v. Wilson Sporting Goods, 288 F. Supp. 543, 560 (N.D. Ill. 1968); United States v. Standard Oil Co., 253 F. Supp. 196, 227 (D.N.J. 1966).[39/]

38/ See also Merger Guidelines of Department of Justice, Sec. 18 "Mergers Involving Potential Entrants," 1 CCH Trade Reg. Rep. ¶ 4510 at 6887.

39/ See also Justice Marshall's concurrence in Falstaff. "I know of no case suggesting that this principle [potential competition] is only applicable when the plaintiff can show that the merger will have present anticompetitive consequences * * *." 410 U.S. at 547.

BOC ignores the unanimous position taken in the foregoing cases and enforcement policy guidelines and asks this Court to hold that Section 7 is applicable only to mergers which lessen competition actually existing at the time the merger occurs. Thus, if a company clearly intent on entering a market--even to the point of building a plant--is acquired by a leading firm in the market before the first company is producing and in actual competition, BOC would hold that the acquisition is immune from attack under Section 7 since all that was eliminated was the prospect of future competition.

To read Section 7 with such a myopic eye would be at odds with the reading given Section 7 subsequent to its amendment in 1950. "[Amended section 7] requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" United States v. Philadelphia Nat'l Bank, supra, 374 U.S. at 362 (1973).

Such a construction would be against the congressional purpose in amending the statute because it would create a loophole in a statute designed to close a loophole.[40/] As amended, Section 7

40/ Prior to its amendment in 1950, the proscription in Section 7 against mergers that may substantially lessen competition did not apply unless the acquired and acquiring companies were in competition. 38 Stat. at 731-32. That requirement was removed by the Celler-Kefauver amendment in 1950. United States v. Brown Shoe Co., 370 U.S. 294, 317 (1962).

"look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition" United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966). "The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future," and "[f]rom the point of view not only of the static competitive situation but also the dynamic long-run potential" United States v. Continental Can Co., 378 U.S. 441, 458, 466 (1966).

Section 7 is as concerned with "preserving the possibility of eventual deconcentration" of oligopolistic markets as it is with preventing increases of concentration. United States v. Aluminum Co. of America, 377 U.S. 271, 279 (1964) quoting from United States v. Philadelphia National Bank, supra, 374 U.S. at 365 n.42. 41/

Furthermore, Section 7 applies to conglomerate mergers that do not eliminate present competition but which raise entry barriers making it more difficult for new competitors to enter. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); General Foods Corp. v. FTC, 386 F.2d 936 (3d Cir. 1967), cert. denied, 371 U.S. 919 (1968). It would be anomalous to apply Section 7 to mergers that raise entry barriers and thereby chill the efficacy of potential competition but not apply the statute to mergers that directly remove the most probable future entrant into a highly barricaded market. As the Commission noted, "the removal of BOC as the most likely of a

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41/ See also Kennecott Copper Corp. v. FTC, supra, 467 F.2d at 77-78 n. 8 (10th Cir. 1972) ("The possibility of new rivals coming into the market by internal expansion, or by acquisition of a firm too small to compete by itself against the largest firms, is essential to effective competition").

limited group of possible entrants into the market has the same, if not greater, adverse effect on prospects for future competition as the raising of entry barriers. Both effects reduce the likelihood that future entry will occur, thus entrenching the existing firms already in the market" (A895).[42/]

The only authority that BOC can muster for its cause is Professor Rahl's argument that there is a conceptual difficulty in reading Section 7 to apply to an acquisition that simply results in a failure to augment competition, rather than a lessening of existing competition. Rahl, Applicability of the Clayton Act to Potential Competition, 12 ABA Section of Antitrust Law 128, 143 (1958). But the proper test is a comparison of competition as it exists after the acquisition with what would probably have existed had the acquisition not occurred. Viewed in terms of probable future events, there is no conceptual difficulty. Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1379-84 (1965).

The "actual potential entrant" doctrine is fully applicable to mergers between a foreign and domestic corporation and such mergers are reviewed on the same basis as purely domestic mergers. United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.)

42/ Indeed in Procter & Gamble, one of the grounds asserted against the merger, in addition to the raising of entry barriers, was the loss of Procter as a potential competitor. Procter had been found to be the "most likely prospective entrant" (386 U.S. at 575) and "the number of potential entrants was not so large that elimination of one would be insignificant" (id. at 581).

aff'd without opinion, 385 U.S. 37 (1966). In that case, Schlitz, a major brewer in the relevant domestic markets, acquired a controlling interest in Labatt, a Canadian brewer. The Court found that although "Labatt [was] not * * * a substantial competitor in the United States * * * it had the desire, the intention and the resourcefulness to enter the U.S. markets * * *" (id. at 147). The acquisition was held to violate Section 7 by removing the potential future entry represented by Labatt. See also United States v. Standard Oil Co., 253 F.2d 196, 227 (D.N.J. 1966).

III. The Commission was Correct in Using a "Reasonable Probability" of Future Entry Test in Determining Whether BOC was a Potential Entrant.

The Commission found that

> there was a "reasonable probability" that BOC would have eventually entered the U.S. industrial gases market by internal expansion, or its equivalent, but for the acquisition of Airco * * *. [A891]

BOC argues that the "reasonable probability" standard adopted by the Commission is erroneous; that a firm "should not be classified as an actual potential entrant unless there is clear and unequivocal proof that the firm in fact would have entered the market by another means in the imminent future" (BOC Br. 77). We submit the standard the Commission adopted is the proper one.

In United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1974), the Court dealt with the question whether the formation of a joint venture between two corporations, Pennsalt and Olin

Mathiesen, foreclosed potential competition by one or both of the companies in the production of sodium chlorate in the Southeastern part of the United States. The Court, after reviewing objective factors that indicated that each company had the ability and incentive to enter the market alone, concluded (id. at 175);

> Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do. [Emphasis added]

Although the Court did not disturb the trial court's finding that "there was not a reasonable probability" that both Pennsalt and Olin would have entered the market independently of the joint venture (id. at 175), the Court stated that another question should have been decided by the lower court--namely, whether one of the venturers would have entered the market de novo with the other at edge of the market "remain[ing] aloof watching developments." Id. at 174. On this issue the Court remanded, holding that a finding should be made

> [A]s to the reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor. [Id. at 175-76; emphasis added]

Thus, it is clear that the proper standard is one of "reasonable probability" where an "actual potential entrant" question is

involved.[43/]

The "reasonable probability" standard was applied in Ekco Prods. Co. v. FTC, 347 F.2d 745 (7th Cir. 1965) where the "actual potential entrant" issue was the only question before the court. Citing Penn-Olin, the court stated that "the test is whether there is a 'reasonable probability' that the acquiring corporation would have entered the field by internal expansion but for the merger." Id. at 752-53. In that case the court agreed with the Commission that the acquisition by Ekco Product Company of the leading manufacturer of commercial meat handling equipment violated Section 7 of the Clayton Act because there was a "reasonable probability that Ekco would have enter the commercial meat-handling industry by internal expansion." Id. at 753.

Finally, it should be noted that in Marine Bancorporation both the district court and the Supreme Court assumed throughout their opinions that the reasonable probability standard was applicable in an actual potential entrant case. United States v. Marine Bancorporation, 1973-1 Trade Cases ¶74,496 (W.D. Wash. 1973), aff'd, 418 U.S. 602, 616, 617 (1974).

43/ In remanding this issue the Court stated "we reiterate that it is impossible to demonstrate the precise competitive effects of the elimination of either Pennsalt or Olin as a potential competitor" (id. at 176) and stressed that "the [district] court should remember that the mandate of the Congress is in terms of the probability of a lessening of substantial competition, not in terms of tangible present restraint" (id. at 177).

IV. Loss of BOC as a Probable Future Entrant Into the U.S. Industrial Gases Market Would Substantially Diminish the Prospects of Future Competition and Deconcentration

As Chief Justice Burger stated in his separate opinion in Ford Motor Co. v. United States, 405 U.S. 562, 587 (1972): "[T]he ground typically present when a potential entrant enters an oligopolistic market by acquisition rather than internal expansion" is that the acquisition "has deprived the market of the pro-competitive effect of an increase in the number of competitors."

The Commission found that entry by BOC by internal growth or its equivalent would be important to the industrial gases industry. "New entry into another geographical market by a strong, proven-and-tried competitor frequently has the effect of shaking up established industry leaders and sets in motion pressures on them to compete more vigorously in price or services in order to retain their existing market shares" (A901).[44/] The Commission additionally noted that BOC's presence on the edge of the market awaiting profit opportunities could have a future restraining effect on market leaders. "Although there is no evidence of such disciplining effect in the past, if present trends continue and supply becomes tight, leading firms may coordinate pricing decisions and areas of specialization * * *. The possibility of entry by [illegible] may become a factor to be reckoned with" (A880).

44/ See Philadelphia Nat'l Bank, supra, 377 U.S. at 370. "There is an alternative to the merger route * * * so-called de novo branching. * * * [O]ne premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." See also Kennecott Copper Corp., supra, 467 F.2d at 78: "[T]he preservation of the possibility of future deconcentration is a legitimate aim and the inhibition of that possibility, because of the acquisition, is a relevant factor in assessing illegality" (id. at 78.)

The evidence supports the Commission's concern that as trends continue and supply of certain industrial gases become scarcer, leading firms may coordinate pricing decisions and areas of specialization. The record indicates that the industry is widely recognized by those involved in it as being susceptible to administered prices by market leaders.

Thus, in interviewing U.S. industrial gases companies in late 1969, BOC's representatives were told by a representative of Union Carbide that the company intended to raise prices soon and predicted that competitors would follow (A5549).[45/] Other observers outside that company confirmed that "[a]nother price rise is believed to be imminent with Union Carbide acting as leader and the rest following" (A5554, A5552).

At a private meeting on September 6, 1973, a representative from one of the leading industrial gases firms told BOC's chairman that prices in the U.S. industrial gases market had stabilized and that "the three main competitors no longer encroach on each other's area of domination" (A5376). Thus, indications are clear that the industry behaves as a classic oligopoly. Had BOC expanded into the U.S. industrial gases market, it obviously would have been compelled to seek its place in the market at the expense of the established firms, making it more difficult for them to retain their "areas of domination."

45/ When asked about antitrust considerations he was reported as stating it was "not the same as price fixing, if one starts and the rest follow, but you can never tell and there must be no suggestion of collusion" (A5549).

In order to find that competition may be substantially lessened by the elimination of expansion by BOC into the U.S. industrial gases market, the Commission was not required to find, as argued by BOC, that a de novo or toehold expansion would, as a matter of certainty, substantially improve competition. The Supreme Court has expressly held that in an actual potential competition case it need only be shown that "alternative methods of entry * * * offer a reasonable likelihood of producing procompetitive effects." Marine Bancorporation, supra, 418 U.S. at 639. That showing has been made here.

United States v. Phillips Petroleum Co., supra, 367 F. Supp. at 1256-57 (affirmed by the Supreme Court subsequent to Marine Bancorporation) establishes that in non-regulated industries the substantiality of anticompetitive effects resulting from the elimination of an actual potential entrant may be inferred from objective facts such as those present in this case:

> The objective evidence of record concerning Phillips' capacity and motivation to enter the market unilaterally, Phillips' status as the most likely potential entrant, the small number of other potential entrants, the feasibility of unilateral entry by Phillips, and the concentrated nature of the market are legally sufficient to establish that Phillips' entry into the market through the Tidewater acquisition had substantial anticompetitive effects. It must necessarily be assumed that the entry of an aggressive major company such as Phillips into such a market on a unilateral basis would have conferred substantial competitive benefits which were lost when it was allowed to step into the shoes of an established major factor in the market. The substantiality of the anticompetitive effects of the Tidewater acquisition may be inferred from the objective facts present here.

We now turn to BOC's arguments that potential competition is, nevertheless, not important in this industry.

A. The threat of upstream integration by some customers does not guarantee competitive performance throughout the industry.

BOC argues that the threat of future upstream integration by customers makes potential competition unimportant (BOC Br. 94-99). Although the Commission recognized that there may be some check placed on profit margins on tonnage supply contracts as a result of the threat of vertical integration by customers "this would not assure that prices and profits will not exceed a competitive level" in the gases industry (A901).

BOC's arguments on this issue amount to little more than a quibble over details.[46/] Nowhere in the record is there any evidence that the possibility of some large customers integrating backward into production of tonnage gases has kept prices competitive throughout the industrial gases industry.

It should be realized that only a few customers are large enough to back-integrate economically in industrial gases.

46/ BOC contends that contrary to what the Commission found, there has been a trend toward greater "captive production" of oxygen by steel companies (BOC Br. 94-95 ftn.). The figures in BOC's brief are misleading because they are based on a so-called "average annual increase" from 1968 through 1972. The average annual increase is high due to the fact that the proportion of U.S. oxygen produced by iron and steel companies was unusually low in the first year (1968) of the period BOC has selected. If 1969 is selected as the base year the trend is downward. Thus the percentage represented by iron and steel companies was 9.1% in 1969, 9.4% in 1970, 8.4% in 1971, and 7.2% in 1972. (A376). This downward trend is also confirmed by statistics published by the Iron and Steel Institute (A5108) which shows a greater proportion of "purchased oxygen" being consumed by the industry as compared to "produced oxygen" during 1969-1972. See also A1846.

What integration has occurred is mostly limited to some large steel companies. Industry witnesses testified that companies that have integrated backwards occasionally sell surplus production to an industrial gases company for distribution, but not directly into the open merchant market (A3528-29, A1268, A1805).[47/] Companies that have back-integrated are not looked upon as possible entrants into the merchant business because they do not have down-stream cryogenic facilities (A3529-30, A1268). Thus, the presence of such companies has no effect on the sale of gases to the merchant market.

BOC not only ignores the above considerations, but makes the extravagant claim that back-integration is possible in two-thirds of the entire industrial gases business (BOC Br. 97). BOC's calculation necessarily assumes that all atmospheric gases and hydrogen are produced for pipeline shipment to tonnage customers. This is obviously incorrect, as indicated in BOC's own calculations (A389-94, A5212-17, see also A4891-92).

BOC also disagrees with the Commission's observation that a company contemplating backward integration into gases would probably incur high average unit costs as compared to an industrial

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47/ BOC states the evidence demonstrates that integrated users sell excess gases to the merchant market (BOC Br. 97). As far as the record shows, however, in nearly all cases such gas is sold to industrial gases companies who then purify and package the product for resale to the merchant market (A3528-29, A1268, A1865). The situation in Japan is "totally different" one witness explained, because there spare gases produced by steel companies are sold directly into the merchant market (A2525-27).

gases firm since the latter is able to recoup some costs by sale in the merchant market (BOC Br. 97). But in another part of its brief, BOC correctly observed that "a company trying to enter the tonnage market alone could not be competitive with existing firms that can quote lower tonnage terms because of profits made on merchant gases * * *" (BOC Br. 30).

As noted, the only companies shown in the record to have integrated backward into atmospheric gases are some steel companies, including Ford Motor's steel production facility (Tr. 2242-44, 442-43, 288-93). BOC refers to possible "backward integration" by petroleum and chemical companies (BOC Br. 95). There is no evidence that such firms are likely to "integrate" into atmospheric gases. Such firms do produce certain gases. However, their production of these gases appears to be due not to any desire for integration but because such gases are an inevitable by-product of petroleum refining or chemical processes such as ammonia manufacture (A1187, A1207, A1268). Accordingly, their ability to respond to competitive forces in the gases market is limited, since the demand for their primary products will tend to control their supply of gases.

B. In-plant captive production and consumption was properly excluded from the Commission's market universe.

BOC argues that the Commission erred in not including the value of gases produced by firms other than industrial gases companies when it determined market shares held by the four and eight largest firms (BOC Br. 99-104 and Annex). BOC argues that production of gases even for internal consumption in the same plant should be included in the universe.

But inclusion of such production would not be realistic as this "production" never reaches the open market. The vertically integrated firms utilize the gases they produce only for internal manufacturing processes. Any excess gas which they might sell is sold to industrial gases firms (supra, p. 63) and thus they do not sell <u>in competition</u> with industrial gases firms or their distributors.

Even if one were to accept a market consisting of total production of gases by all manufacturers, the Commission could properly exclude internal production and consumption. "[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" <u>Brown Shoe Co</u>. v. <u>United States</u>, 370 U.S. 294, 325 (1962). Among the "practical indicia" which <u>Brown Shoe</u> listed as indicating the appropriateness of submarkets are "industry * * * recognition of the submarket as a separate economic entity, * * * unique production facilities, distinct customers * * * and specialized vendors." <u>Id</u>. at 325. All of these factors are present here. Industrial gases companies are recognized as a separate industry (A747). They have facilities for marketing and transporting industrial gases which steel and other integrated users lack (A750). They, and not the integrated users, sell to the merchant trade.

Thus the exclusion of in-house production and consumption was proper. Such exclusion is in accordance with cases where the

issue has been raised.[48] In United States v. Greater Buffalo, Inc., 327 F. Supp. 305, 307-09 (W.D.N.Y. 1970), reversed on other grounds, 402 U.S. 549, 555 (1971) both the district court and the Supreme Court recognized the "independent color comic supplement printing business" as a market separate from "in-house" printing by newspapers themselves because of cost savings inherent in printing supplements on a high volume basis. This was so held even though it was acknowledged that a substantial number of newspapers print color comic supplements themselves and that newspapers that do not would do so "if at any time the cost of purchasing such color comic supplements exceeds the cost to the newspaper of printing them" (327 F. Supp. at 307-08). See also United States v. Amax, Inc., 402 F. Supp. 956, 961 (D. Conn. 1975), American Smelting & Refining Co. v. Pennzoil United, Inc., 295 F. Supp. 149, 156 (D. Del. 1969).

C. The Commission's use of total value of shipments by plants classified in the industrial gases industry as the market universe was proper

Firms that produce and sell industrial gases are required by law to report to the Bureau of the Census the quantity and

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48/ Although "captive production" happened to be included in market statistics in cases cited by BOC (BOC Br. 102-03), the question whether a market could be defined as excluding captive production was not raised. As noted by the Commission, the Alcoa case (United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)) was decided in a different context (A876) and, in any event, did not hold that sale of ingot aluminum on the open market was not a separate market (or submarket) unto itself. The definition of an appropriate relevant market is a factual question, not a matter of stare decisis, and depends upon the characteristics of the industry involved. Sulmeyer v. Coca-Cola Co., 515 F.2d 835, 849 (5th Cir. 1975).

net selling value, f.o.b. plant, of the industrial gases produced and shipped by them (A758, A4871-88). The total value of industrial gases shipments f.o.b. plant in the United States for 1972 reported to the Bureau of the Census by plants primarily engaged in the manufacturing of industrial gases for sale was $595 million (A4863). It was this figure that the Commission used as the market universe in calculating concentration ratios in 1972 and Airco's market share of 15.7 percent (A874 n. 4).

Manufacturers whose production was not included in this figure were those companies which produced industrial gases as other than a "primary product" at the plant. Generally, such gases are produced for the manufacturer's own use, but occasionally, as previously noted, some manufacturers have surplus gases which they wholesale to industrial gases companies on a spot basis (A1258, A1267-69, A3530). BOC claims that this production (shipment of industrial gases from a plant whose primary product is in another industry) should have been included in the universe total in 1972, bringing it up to $649 million (BOC Br. 104-06). (This argument is in addition to BOC's argument that in-house production <u>and</u> <u>consumption</u> should be considered as part of the market).

The Commission's use of the $595 million universe figure was proper. The companies whose plants produce gases as by-products (mainly chemical and petroleum companies) do not market the gases

on the open market and hence are not considered part of the industrial gases industry (A1259, A1806, A1872-73, A3529). Hence these companies' shipments were properly excluded in measuring the relevant market.

However, it should be noted that, as found by the Commission (A876), even if these shipments were added to the market universe, no substantial difference would occur. Four-firm concentration would still exceed 60 percent, eight-firm concentration would approximate 80 percent and Airco's share would be 14.42 percent (Finding 62 at A5331-32).[49/] The Commission found that even using the $649 million universe figure "[t]he change is not so substantial as to cause a different result in this case" (A876).

In either case, the concentration levels unquestionably demonstrate that the industrial gases market is highly concentrated[50/] and of sufficient magnitude to be a candidate for application of the potential competition doctrine. Cf. United States v. Falstaff Brewing Corp., supra, 410 U.S. at 527-28 (top four firms accounted for 61 percent of market; top eight firms, 81

49/ This Finding was originally non-public as it contained individual firms' shipment figures (A5331). The Commission removed these figures from in camera status, however (A873 n.3). The Court may, therefore, treat Finding 62 as no longer a "confidential" finding.

50/ A leading authority on industrial structure of American industry classifies the industrial gases industry as highly concentrated and very close to being among the relatively few "extremely high concentrated" industries in this country. Adams "Public Policy in a Free Enterprise Economy" in The Structure of American Industry, 467-69 (Adams, ed. 1971).

percent); United States v. Phillips Petroleum Co., supra, 367 F. Supp. at 1251-52 (C.D. Cal. 1973), aff'd without opinion, 418 U.S. 906 (1974) (top four firms--61 percent; top seven firms--83 percent). Cf. Stanley Works, 78 F.T.C. 1023 (1971), aff'd on the basis of actual competition being lessened, 469 F.2d 498, 504 (2d Cir. 1972), cert. denied, 412 U.S. 928 (1973) where this Court found that an industry in which four firms accounted for 49-51 percent of the market was "* * * sufficiently concentrated to invoke the proscriptive sanction of the Clayton Act * * *."

Furthermore, concentration in the industrial gases industry has increased since 1967,[51/] thereby causing added concern should a major acquisition remove a future entry that could have a deconcentrating effect. Kennecott Copper Co. v. FTC, supra, 467 F.2d at 76.

V. The Evidence Supports the Commission's Finding That BOC was the Most Likely of a Small Group of Potential Entrants to Enter the U.S. Industrial Gases Market.

BOC disputes the Commission's finding that BOC was the most likely of a small group of potential entrants to enter the U.S. domestic gases market (BOC Br. 112-19). There is substantial evidence in the record, however, supporting this finding.

51/ Four-firm concentration increased from 67 percent to 70 percent between 1967 and 1972; eight-firm concentration increased from 84 percent to 86.5 percent during the same time period (A760).

By 1973 BOC was the only one of the three largest industrial gases firms in the world that was not operating in the United States (A5347). It was considered by many industry witnesses as one of the few firms not already in the U.S. industrial gases market possessing the resources and technical know-how to enter this country's gases market (supra p. 18). Officials of Linde and Air Products (the top two firms in the industry) perceived BOC as the most likely major new entrant (supra, p. 19). Aside from BOC, the other firms named by members of the gases industry as possible entrants were Messer Griesheim and Linde A.G., both German firms, and AGA of Sweden.[52/]

Whether or not BOC was the most likely of this group to enter, or whether they should all "be regarded as at least equally probable entrants" (BOC Br. 117) is really beside the point. In either case BOC was one of a small number of potential entrants and that is sufficient to invoke the potential competition doctrine.[53/]

52/ BOC erroneously states that the Commission "dismissed" these three foreign firms as potential entrants (BOC Br. 115). Although the Commission noted that testimony and BOC's own observations (A5348) were to the effect that none of these firms were considered "strong candidates" for entry, the Commission recognized them as possible entrants (A883).

As we informed the Court (supra, p. 42), Messer Griesheim in fact recently entered the U.S. market by acquiring a toehold company, Burdett Oxygen Company of Norristown, Pennsylvania.

53/ FTC v. Procter & Gamble Co., supra, 386 U.S. at 581. See also Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1384-85 (1965).

BOC contends, however, that the Commission erred by not considering regional U.S. gases companies as more likely entrants than BOC into areas where they do not now operate (BOC Br. 113). The short answer to BOC's argument is that these companies are already in the relevant market, i.e., the U.S. industrial gases business. In any event, the Commission found (A884) that these firms do not constitute major competition against the "Big Three" firms (Linde, Air Products, and Airco) that have dominated the U.S. industry and whose collective share of the national market has been increasing (A760). The regional firms have never had the ability on their own to make major inroads against these market leaders.[54/] Also they do not have the capital resources and technological resources to compete with regard to expanding frontiers of new technology (A2485-86).

54/ In their study of the U.S. industrial gases market for BOC, Perham and Greenfield (BOC) observed (A5536) that the

> local operators such as Big Three [which is ranked seventh in national shipments] * * * are boxed in on the long term and there must be a limit to their profitable growth opportunity. They also need their local connections to make sales, and growth a long way from base will be difficult for them.

See also A5485, A5563-64, A5538, A473-80.

Finally, BOC argues that tonnage users that have already integrated upstream and tonnage users "capable of doing so" are more apt to enter the industrial gases business than BOC (BOC Br. 117-19). However, for the reasons that regional and local gases producers do not constitute major potential competition, tonnage users also fail to qualify for that role. None has successfully entered the market in the past and the industry does not consider them to have the required expertise needed to make them likely prospects for entry (A1259, A1358-59, A1482-83, A3529-30, A5983). The Commission was justified, therefore, in not considering these companies as likely entrants (A883, and see A901).

VI. Contrary to the Views Presented by the British Government, Airco Should Not be Considered a Permissible Toehold Acquisition in Order to Facilitate Foreign Investment in This Country.

For many of the same reasons advanced by BOC, the British Government argues that BOC was not a potential entrant into this country's industrial gases market.[55/] It emphasizes particular factors that make entry into a U.S. market more difficult for a foreign firm than for an American firm. This observation, while it may have general merit, has little bearing in this case. As we have shown, there simply are no American firms that are likely to make a significant entry into the U.S.

55/ *Amicus curiae* brief of the Government of the United Kingdom of Great Britain and Northern Ireland (hereafter "U.K. Br.") at 4-22.

industrial gases market. The only firms recognized by those in the American industrial gases business as possessing the ability to enter the U.S. industry are the large European gases firms which have not yet entered.

This view is in accordance with actual patterns of entry in the past. The only important new entry into the U.S. market in recent years (at least until the close of the record) was by L'Air Liquide, a large French industrial gases firm. In 1968 L'Air Liquide purchased (through its Canadian subsidiary) American Cryogenics from Standard Oil of New Jersey (now Exxon). Standard Oil in turn had purchased American Cryogenics in 1964 (see United States v. Standard Oil Company (New Jersey), 253 F. Supp. 196, 200 n.2 (D.N.J. 1966)) but had not been able to operate it profitably (A780). L'Air Liquide has been able to turn the company around, and, with the acquisition of other small industrial gases producers, has developed a substantial and profitable operation in this country (A1436-39, A1444-45).

Thus a "foreign firm" has been able to enter into this country's gases business--not only successfully but more successfully than Standard Oil of New Jersey!

The British Government contends, alternatively, that even if it is assumed that BOC was a potential entrant into the U.S. market, the Commission should have considered the acquisition of Airco a permissible toehold acquisition. In this connection it argues (1) that the Commission made no toehold analysis and (2)

if there was a presumption by the Commission that a firm whose market share is greater than 10 percent cannot constitute a toehold, such presumption has the effect of raising an anticompetitive barrier to foreign entry (U. K. Br. 22-30).

Although the Commission's Opinion did not take up the question of whether Airco should be considered a toehold firm, the Commission specifically adopted (A859) the ALJ's finding that Airco was not a procompetitive toehold acquisition (A832).[56]

That the Commission did not discuss the matter in its Opinion as distinguished from its Findings is understandable in view of the fact that BOC stipulated that Airco was not a toehold firm (A1833, A1918). In view of the fact that BOC has conceded that Airco does not constitute a toehold firm, and does not so argue to this Court, we submit that should end the matter.

In any event, the Commission's finding is supported by substantial evidence. Airco was the third largest industrial gases firm in this country. BOC ranked Airco as the fifth largest industrial gases and equipment firm in the world (A5347). Unlike the toehold acquisition upheld by the Commission in Budd Co., 3 CCH Trade Reg. Rep. ¶ 20,998 (1975), Airco was

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56/ The ALJ pointed out, *inter alia*, that

> Airco clearly does not meet the criteria for a toehold firm as its assets and market position enabled BOC instantly to achieve a dominant, national position in the U.S. industrial gases market without any expansion effort. BOC's chairman testified that BOC would need over five percent of the national market to be a viable competitor (Smith 1837 [A2596]). Airco's share of the U.S. industrial gases market substantially exceeds that percentage. [A832]

already a strong, viable firm with substantially more than 10 percent of the market, and no showing was made that the BOC acquisition was needed to enable Airco to overcome barriers that prevented it from competing on equal terms with market leaders. 57/ See also United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1258 (C.D. Cal. 1973), aff'd without opinion, 418 U.S. 906 (1974) (rejecting acquisition of a firm with 6-7 percent of the relevant market since "Phillips did not use Tidewater as a small base from which to expand its operations and did not have a substantial need to build upon the acquisition, but instead used Tidewater's assets as the major element of its market entry.") 58/

57/ In the Budd decision (which was authored by Chairman Engman, who wrote the Commission's Opinion in this case) the Commission found, inter alia, that the acquired company was an undercapitalized regional firm, unable to secure financing to expand its market reach and unable to match more favorable credit terms its national competitors were able to extend to customers. The acquired company's market share varied between 3 to 8 percent in the relevant market during the years prior to the merger. Finding that the record affirmatively showed that the acquisition enabled the firm to compete more effectively, the Commission upheld the acquisition as a permissible toehold merger. In so doing it also announced a general rule in potential competition cases that firms possessing no more than 10% in a target market, where the 4-firm concentration is approximately 60% or more, should ordinarily be presumed to be a toehold or foothold firms. "This presumption by no means is conclusive and the inference of lack of anticompetitive effects flowing from acquisition of such a firm can be rebutted in particular cases" id. at 20,857. See also Comment, 89 Harv. L. Rev. 800 (1976).

58/ Amicus British Government contends that a procompetitive effect of BOC's acquisiton would be enhancement of Airco's ability to build air separation plants (U.K. Br. 29). This one factor is hardly sufficient to constitute Airco as a toehold. Furthermore, Airco was engaged in the design and construction of air separation plants, although not "all components of such plants" (A114).

Finally the _amicus_ brief argues that affirmance of the Commission's decision in this case "will, if not set aside, have detrimental consequences for international investment policies" (U.K. Br. 30). With all respect to the British Government, we believe this statement vastly exaggerates the effect this case will have on foreign investment. The Commission's decision cannot be viewed as an unreasonable impediment to foreign companies investing in American industry generally or even in the industry involved here. Thus, the Commission's order provides that upon divestiture BOC is free to acquire a toe-hold domestic industrial gases firm, which is defined in the order as a company which in the two most recent reporting years has reported value of shipments of industrial gases to Census not in excess of $25 million (A862).

Nor does the Commission's enforcement of Section 7 in this case amount to a discriminatory or novel application of the anti-trust laws to international mergers or acquisitions. The potential competition doctrine has previously been applied in this area. _United States_ v. _Jos. Schlitz Brewing Co._, 253 F. Supp. 129 (N.D. Cal.), _aff'd without opinion_, 385 U.S. 37 (1966). Enforcement action has also been taken against foreign companies participating in joint ventures and making acquisitions in this country. See, _e.g._, _United States_ v. _Monsanto Co._, 1967 Trade Cases ¶ 72,000 (W.D. Pa. 1967)(consent decree); _United States_ v. _Standard Oil Co._, 1970 Trade Cases ¶ 72,988 (N.D. Ohio 1970 (consent decree). See also _International Economic Report of the President for 1974_, 5 CCH Trade Reg. Rep. ¶ 50,262 at 55,520-21.

The argument that investment from abroad may be inhibited is not a proper consideration in judging whether an acquisition has violated Section 7. In Philadelphia Nat'l Bank, supra, 374 U.S. at 334, 371, the Court rejected the argument that an anti-competitive bank merger in Philadelphia should be upheld because it would create a larger bank more able to compete with New York banks, thereby bringing more banking business to Philadelphia and stimulating its economic development:

> [A] merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid. [Id. at 371]

MEDICAL EQUIPMENT

I. BOC Has Suffered no Prejudice as a Result of the Commission's Finding of Violations With Respect to Three Medical Equipment Lines of Commerce.

The Commission's complaint alleges that one of the effects of the acquisition of Airco stock by BOC may be to lessen competition in the manufacture and sale of inhalation anesthetic equipment or any submarket thereof in the United States (A23). "Inhalation anesthetic equipment" (IAE) is defined in the complaint as equipment and accessories used in the administration of gas for anesthetic purposes (A18).

Testimony established that an anesthesia machine is the most significant IAE product and consists essentially of a cart with most of the IAE equipment attached, such as vaporizers, face masks, valves, meters, etc. (A782). On the other hand, some individual equipment is also sold separately (A904).

Complaint counsel issued subpoenas to the known firms in the industry calling for sales data of each type of equipment. Thus, the subpoena required production of sales data for (a) anesthesia machines, (b) anesthesia vaporizers not included in (a), anesthesia face masks not included in (a), and some 12 additional IAE items not included in (a). (A5673, A782-84).

The sales data for individual IAE items were obtained from 23 companies and are set forth in an _in camera_ table in the initial decision (A5333-34). Treating sales of all IAE

as belonging is a single market the ALJ found Section 7 was violated because Airco's share of the IAE "market" approximated 31 percent ($7,616,338) in 1972, and the share held by BOC's American subsidiaries amounted to eight percent ($2,013,362). The ALJ also found the IAE "market" was highly concentrated, the four largest manufacturers having 64.5 percent of sales (A789-97, A833-37).

On appeal, BOC disputed that sales of all IAE equipment constituted a single product market. The Commission agreed (A904)

However, a separate issue that was raised on appeal was whether there was competitive overlap between any of Airco's and BOC's individual IAE products. Thus, BOC in its appeal brief to the Commission conceded there was overlapping competition between BOC and Airco in anesthesia machines but argued that it was not substantial. BOC also argued that although it and Airco sold anesthesia vaporizers, they were of different types and should not be considered competitive (p. 90).[59/] (The Commission found otherwise (A904 n.30, A859)).

In its answering brief, complaint counsel responded to BOC's argument, pointing out that "the anesthesia machine, which BOC readily admits is made by both BOC and Airco, 'consists of

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59/ A copy of BOC's appeal brief and reply brief to the Commission are attached to BOC's Motion for Leave to File Oversized Brief, filed with this Court on June 3, 1976.

nearly every product in the IAE market'" and "in addition to being the two largest manufacturers of anesthesia machines, BOC and Airco are also number one and number two, respectively, in the manufacture and sale of anesthesia vaporizers." 60/

In its reply brief, BOC did not respond further to this point and at no time did it argue to the Commission that it would be improper for it to consider the degree of competition eliminated in sales of individual IAE products. Indeed, as demonstrated above, it was BOC that raised the issue with the Commission. Having done so it cannot now claim that it was improper for the Commission to make findings on that issue. 61/

In any event, BOC has not contended that inhalation anesthetic machines, vaporizers, and face masks are not relevant product markets or submarkets within the meaning of Section 7 and it has not suggested what it could conceivably argue or show against the view that these items of equipment constitute relevant product

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60/ Answering Brief of Counsel Supporting the Complaint, p.81.

61/ Furthermore, if BOC sincerely believed that the Commission improperly made findings on the issue, it was obligated fo file a petition for reconsideration. Section 3.55 of the Commission's Rules of Practice, 16 C.F.R. § 3.55, provides for the filing of such a petition with respect "to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." Having failed to raise the issue of "suprise" before the Commission, BOC cannot raise it here. United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body has not only erred but has erred against objection made at the time appropriate under its practice.").

markets.[62] Therefore, there being no showing of prejudice, the Commission's determination should not be disturbed. See Section 10 of the Administrative Procedure Act, (now 5 U.S.C. § 706): * * * [D]ue account shall be taken of the rule of prejudicial error." And see United States v. Continental Can Co., supra, 378 U.S. at 457 (upholding prima facie showing of a line of commerce not pressed before, since, inter alia, "it is composed largely, if not entirely, of the more particularized end-use lines urged in the District Court by the Government").[63]

II. The Market Share Data in the Medical Supply Lines of Commerce are Reasonably Accurate

BOC disputes that the market shares of manufacturers of anesthesia machines, vaporizers and machines are reliable. Its principal argument is that there is no assurance that the aggregate figures approximate market universes.

The sales data in the record concerning the IAE industry came from subpoenas served by complaint counsel on 37 companies (A790) and the data concerning Airco and BOC and BOC subsidiaries

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62/ BOC did argue below that veterinary anesthesia machines and dental anesthesia machines do not belong in a common market with surgical anesthesia machines. Both the ALJ and the Commission rejected this argument, primarily on the ground that there is interchangeability of production factors among them justifying treating them together as a single product market (A786-87, A904 n.30). Cf. Brown Shoe Co. v. United States, supra, 370 U.S. at 325 n.42.

63/ The cases cited by BOC (BOC Br. 129-31) are distinguishable. In all of them it was clear that the appealing party not only disputed the validity of the non-litigated theory but would have offered contrary evidence had the matter been raised during the hearing.

were stipulated (A5775-5815, A5841-48). A table (Table I) containing a list of each subpoenaed company's 1972 sales at the manufacturing level of various inhalation anesthetic equipment is set forth in the confidential section of the initial decision (A5333-34).

Complaint counsel also elicited testimony from industry executives as to their estimate of the total sales of IAE equipment in the United States. The general manager of Foregger (a division of Air Products and a leading company in the field) listed 13 companies which he identified as accounting for 90 percent of U.S. sales (A2281-83). These companies, all of whose sales are reflected in Table I, had aggregated sales of $22.4 million in 1972, which would result in an estimated universe figure of $24.9 million. A witness from another company estimated the total market as $25 million for 1972 (A1995). Another estimated $20 million (A2239). The aggregated sales of all the companies shown in Table I are $24.5 million.

In view of the witnesses' testimony, the Commission accepted Table I as a reasonably complete survey of industry sales (A791-92, A858, A906). In addition the Commission found the data to be a sufficiently reliable basis for measuring concentration and market shares with regard to anesthesia machines, vaporizers, and face masks, noting that BOC's own estimate that Airco has a 55-60 percent market share of anesthesia machine sales (A5493) is consistent with Table I (A906).

Recognizing that the development of more precise market data could be prohibitively expensive and burdensome to obtain in industries characterized by a central core of firms surrounded by a fringe of much smaller competitors,[64/] the Commission accepted the teaching in Brown Shoe, supra, 376 U.S. at 342 n.69, that "precision in detail is less important then the accuracy of the broad picture." (A906) See also Philadelphia Nat'l Bank, supra, 374 U.S. at 364 n.40; A.G. Spalding & Bros., Inc. v. FTC, 301 F.2d 585, 610-611 & n.20 (3d Cir. 1962)(sales data of 40 percent of the firms in the industry held sufficient in view of fact their sales represented 90 percent of universe).

64/ Industry witnesses at the hearing identified the leading firms in IAE sales and all those companies were served with subpoenas. In addition, BOC estimated that Airco had 33 percent of IAE sales and Foregger 10 to 15 percent, which estimates are consistent with Table I (compare A4247 with A5333-34). BOC did not serve any other IAE manufacturers with subpoenas to secure sales data and elicited only the most general testimony of the existence of a few other manufacturers or importers of IAE (A792-94).

III. The Commission's Determination that Section 7 was Violated in the Three Medical Equipment Markets is in accord with the Law and the Evidence.

As set forth supra, p. 24, both BOC and Airco were leading sellers of anesthesia machines, vaporizers, and face masks. In addition to being the largest manufacturer of anesthesia machines (with 46 percent of the market), Airco was the leading seller of anesthesia face masks (88 percent of the market) and the second largest in anesthesia vaporizer sales (25 percent). BOC sales represented 16 percent of total anesthesia machines sales (placing it second in that market) and 52 percent of anesthesia vaporizer sales. In anesthesia face masks, BOC's sales, as listed in the initial decision, as would give it three percent of the market. 65/

In view of the substantial market shares held by the respective companies, a clear prima facie case of violation was made out. See United States v. Philadelphia Nat'l Bank, supra, 374 U.S. at 363:

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

65/ We agree with BOC that it is not clear how the ALJ arrived at the $36,275 figure listed in the initial decision. (BOC. Br. 134). However, as the Commission noted, the degree of competition between BOC and Airco is understated in any event since Harris-Lake (BOC's subsidiary) reported sales of face masks of $76,942 in 1972 which were manufactured for them by another firm (A906 n.32, and see A5782).

In Philadelphia Bank, the 34 percent increase in concentration in the two largest firms (from 44 percent to 59 percent) was found to be violative of Section 7. 374 U.S. at 365. See also United States v. Aluminum Co. of America, 377 U. S. 271 (1964) (merger between firm with but 1.3 percent market share and a leading company in a concentrated market); Stanley Works v. FTC, supra, 469 F.2d 498 (2d Cir. 1972)(merger between firm with 22-24 percent of market and firm with one percent).

Contrary to what BOC implies (BOC Br. 135) the Court in United States v. General Dynamics, 415 U.S. 486 (1974), did not overrule the presumptive rule of illegality announced in Philadelphia Bank. See 415 U.S. at 496-98.

THE ORDER AGAINST AIRCO

I. The Commission's Findings and Order With Respect to Airco are Supported by Substantial Evidence

Airco's role in the acquisition of Airco stock by BOC was a significant part of the overall transaction. On December 10, 1973, Airco and BOC entered into an agreement under which Airco's board of directors consented to BOC's tender offer for Airco shares. This agreement also provided for reciprocal representation by BOC and Airco on each other's board of directors. Airco actively assisted BOC in making its tender offer, making its list of shareholders available to BOC and having its transfer agent mail BOC's offer to Airco shareholders. (A4258-59, A743).

Further, Airco's board of directors sent letters to Airco's shareholders informing them that Airco's board consented to BOC's offer and that a closer association of Airco and BOC

would be beneficial to both companies (A4333).

In holding that Airco violated Section 5 of the FTC Act, the Commission did not find that Airco's actions were per se unfair trade practices, but only that the acts were violative of Section 5 because they were instrumental in bringing about an acquisition that violated Section 7 of the Clayton Act. The fact that Section 7 applies only to acquisitions of corporate stock which may substantially lessen competition but does not by its terms apply to actions taken by the target company's board to facilitate the acquisition is not dispositive. "It is, of course, well established that the Commission has broad power to apply § 5 to reach transactions which violate the standards of the Clayton Act, although technically not subject to the Act's prohibitions." United States v. American Building Maintenance Indus., 422 U.S. 271, 279 n.7 (1975). Activity which "runs counter to the public policy declared in the Sherman and Clayton Acts" is an unfair method of competition. Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 463 (1941). Cf. Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

That Airco supported the BOC proposal because "it had determined that Airco's shareholders would be better off with BOC rather than Curtiss-Wright as a major shareholder" and because BOC offered more per share than Curtiss-Wright (Airco Br. 13-14), does not lessen the fact that Airco actively facilitated an acquisition that violated the antitrust laws. "It is of no consequence, for purposes of determining whether there has been a combination [in violation of the antitrust laws], that each party acted in its own lawful interest." United States v. General Motors, 384 U.S. 127, 142 (1966).

The Commission explained that the violation by Airco, although perhaps technical in nature, was clear and that it was necessary to subject Airco to certain provisions of the order to assure that the companies would be completely divorced (A909). Thus the order requires abrogation of previous agreements that sought the union between the companies and requires that Airco desist from taking any steps to seat or admit any representative of BOC to its board (A863-64). These provisions of the orders are clearly justified.

CONCLUSION

For the foregoing reasons, the Commission's order should be affirmed and enforced.[66/]

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66/ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." FTC Act, Sec. 5(c), 15 U.S.C. § 45(c). See also Clayton Act, Sec. 11(c), 15 U.S.C. § 21(c).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOC INTERNATIONAL LIMITED, et al., Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.	No. 76-4044
AIRCO, INC., Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.	No. 76-4045

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Respondent were mailed this 15th day of November, 1976, first class, postage prepaid, to counsel as follows:

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